United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,427

961

AMALGAMATED ASSOCIATION OF STREET ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA,

ST. PAUL FIRE AND MARINE INSURANCE CO.,

Appellants,

vs.

HERMAN ADLER,

Appellee.

APPEAL FROM THE U. S. DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

RICHARD W. GALIHER
WILLIAM E. STEWART, JR.,
WILLIAM J. DONNELLY, JR.,
1215 - 19th Street, N.W.
Washington, D. C.

Attorneys for Appellants.

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JOINT APPENDIX

[Filed March 28, 1963]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA 1900 F Street, N. W. Washington, D. C.	)	
and	)	
ST. PAUL FIRE AND MARINE INSURANCE COMPANY Barr Building Washington, D. C.	)	
Plaintiffs,	)	
v.	)	CIVIL ACTION NO. 824-63
HERMAN ADLER, DEPUTY COMMISSIONER BUREAU OF EMPLOYEES COMPENSATION UNITED STATES DEPARTMENT OF LABOR Colonial Building 15th and M Streets, N. W. Washington, D. C.	)	
Defendant.	)	

COMPLAINT

(Action to Set Aside Compensation Order)

1. The jurisdiction of this court is based upon the provisions of Section 21 of the Longshoremen and Harbor Workmen's Compensation Act (33 U.S.C. 921) as made applicable to employment in the District of Columbia by the provisions of Title 36, D. C. Code, Section 501.

2. The defendant is a duly appointed deputy commissioner for the District of Columbia Compensation District under the said Longshoremen and Harbor Workmen's Compensation Act.

3. On September 14, 1961, one Clarence L. Greenwell sustained an injury alleged to have occurred in the course of and rising out of his employment with the plaintiff Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America. Following a hearing, the defendant, Deputy Commissioner Adler, entered a compensation order on the first day of March, 1963, awarding compensation to said Greenwell and directing the plaintiffs to pay the reasonable cost of all medical and surgical care and treatment required by said Greenwell on account of said injury and reading that said injury arose out of and in the course of Greenwell's employment.

4. The findings of the defendant Deputy Commissioner in his Compensation Order of March 1, 1963 ruling that Greenwell's injury of September 14, 1961 arose out of and in the course of his employment was not supported by substantial evidence considering the record as a whole.

5. Deputy Commissioner Adler erred as a matter of law in finding that Greenwell's injury of September 14, 1961 arose out of and in the course of Clarence L. Greenwell's employment with the plaintiff Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America.

WHEREFORE: Plaintiffs pray that the record of all the proceedings before the Deputy Commissioner in the matter, including the Compensation Order of March 1, 1961, be certified to this court, and

Plaintiffs further pray that the findings of the Deputy Commissioner in said Compensation Order of March 1, 1963 to the effect that Greenwell's injury of September 14, 1961 arose out of and in the course of his employment be set aside and vacated.

GALIHER & STEWART
By /s/ William J. Donnelly, Jr.
* * *
Attorney for Plaintiffs

[Filed July 30, 1963]

ANSWER OF DEFENDANT DEPUTY COMMISSIONER

Defendant, Herman Adler, Deputy Commissioner, Bureau of Employees' Compensation, United States Department of Labor, for his answer to the complaint herein:

1. Admits the allegations contained in paragraphs numbered 1, 2, and 3.

2. Denies the allegations contained in paragraphs numbered 4 and 5.

3. For a further defense, defendant deputy commissioner alleges that the compensation order complained of is in all respect in accordance with law.

WHEREFORE, defendant deputy commissioner prays that the complaint be dismissed.

/s/ David C. Acheson
United States Attorney

/s/ Charles T. Duncan
Principal Assistant United States Attorney

/s/ Joseph M. Hannon
Assistant United States Attorney

/s/ Ellen Lee Park
Assistant United States Attorney

[Certificate of Service]

[Filed October 4, 1963]

DEFENDANT DEPUTY COMMISSIONER'S MOTION FOR SUMMARY JUDGMENT

Comes now defendant, Herman Adler, Deputy Commissioner, Bureau of Employees' Compensation, United States Department of Labor, by his attorney, the United States Attorney for the District of Columbia, and moves the Court to enter judgment for defendant on the ground that there is no genuine issue as to any material fact and that defendant is entitled to judgment as a matter of law.

Attached hereto and made a part hereof is a certified copy of the transcript of proceedings before the Bureau of Employees' Compensation, United States Department of Labor, on January 4, 1963, in the matter of Clarence L. Greenwell, Docket No. 24818-2, together with exhibits therein.

/s/ David C. Acheson
United States Attorney

/s/ Charles T. Duncan
Principal Assistant United States Attorney

/s/ Joseph M. Hannon
Assistant United States Attorney

/s/ Ellen Lee Park
Assistant United States Attorney

Attorneys for Defendant Adler

[Filed November 6, 1963]

PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND PLAINTIFFS' COUNTER MOTION FOR SUMMARY JUDGMENT

Comes now the plaintiffs by and through their counsel in opposition to the defendant's motion for summary judgment and for reasons therefore they pray that the attached Points and Authorities be read as a part of this motion hereof. They pray that the Points and Authorities also be read in support of their counter motion for summary judgment.

* * *

[Filed December 26, 1963]

ORDER

Upon consideration of the motion for summary judgment filed herein by defendant, the motion for summary judgment filed herein by plaintiffs, and the oral argument of counsel, the Court finds that there is no genuine issue as to any material fact and that defendant is entitled to judgment as

a matter of law, and it is this 20th day of December, 1963

ORDERED that the defendant's motion for summary judgment be and the same hereby is granted, that the plaintiffs' motion for summary judgment be and the same hereby is denied, and that the action be and the same hereby is dismissed with prejudice.

/s/ Joseph C. McGarraghy
District Judge

[Certificate of Service]

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

* * * * *

THE COMPENSATION ORDER

The compensation order complained of reads in pertinent part as follows:

1. That on September 14, 1961, the claimant above named was in the employ of the employer above named, whose address is 900 F Street, Northwest, Washington, District of Columbia; that the employer was subject to the provisions of an Act of Congress approved May 17, 1928, entitled "An Act to provide compensation for disability or death resulting from injury to employees in certain employments in the District of Columbia, and for other purposes"; that the liability of the employer for compensation under the said Act was insured by the St. Paul Fire and Marine Insurance Company;

2. That on the said day the claimant herein, while performing services for the employer as an alternate delegate at a biennial convention of the employer's parent organization, the International Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, AFL-CIO, at the King Edward Hotel in Toronto, Ontario, Canada, sustained personal injury resulting in his disability when he

slipped and fell in the bathtub while bathing, as a consequence of which he suffered trauma to the back including a strain on the left side of the lumbar area of the back;

3. That the business of the said employer was the operation of a labor union in the District of Columbia in affiliation with the International Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, AFL-CIO, as a local division; that the employer's roster of salaried employees included shop stewards and members of the executive board; that the claimant herein was in the employ of the employer to and beyond September 14, 1961, as a shop steward since 1944 and as a member of the executive board since 1950;

4. That from September 11, 1961 to and including September 15, 1961, the said parent organization of the employer, the International Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, AFL-CIO, in furtherance of its objectives and functions as a labor union, and including those of its affiliates, sponsored and conducted a biennial international convention, which was held at the King Edward Hotel in Toronto, Ontario, Canada;

5. That on August 15, 1961, the selection of delegates to represent the employer at the said convention was under consideration at a meeting of the employer's executive board; that at the said meeting the claimant withdrew his candidacy for delegate and offered his services as an alternate delegate to the convention in order to promote and facilitate good will and harmony among the executive board members and simplify the procedure for selecting seven delegates from eight members of the executive board; that the employer, pursuant to the recommendation of the executive board and approval by the membership, accepted the claimant's offer and authorized his attendance at the convention in the capacity of an alternate delegate;

6. That in the capacity of an alternate delegate the claimant did not have any delegated duties or voting rights to exercise in connection with the business of the convention; that in the event of the incapacity of

one of the employer's delegates the claimant would be cloaked with the duties and voting rights of a delegate and, therefore, he attended the business meetings and remained on call for the duration of the convention; that by attending the business meetings of the convention the claimant became a better-informed and more effective member of the executive board, which was a benefit to the employer in the furtherance of its operations as a labor union; that the employer effected reservations at the said hotel for living quarters for the delegates and the claimant and paid for the cost; that the employer paid the delegates and the claimant wages on a per diem basis for the duration of the convention and for travel time to and from the convention; that the employer also paid the delegates and the claimant for a daily expense allowance and paid for the cost of transportation; that the employer authorized the claimant to embark on a specific errand in a foreign country for a brief period of time;

8. That at the time of the injury, as found above, the claimant was an employee of the employer within the meaning of the District of Columbia Workmen's Compensation Act;

9. That at approximately 4:00 p.m. on September 14, 1961, the functions of the convention were deferred until the evening of the same day, when a dinner-banquet was held in the said hotel by the convention; that the activities at the dinner-banquet were not entirely for relaxation and entertainment but also, through guest speakers, including a United States Senator, and the customary and usual discussions among the delegates from the various affiliated local unions furnished a means for assimilating additional knowledge relative to labor union problems redounding to the benefit of the employer;

10. That preparatory to attending the dinner-banquet the claimant herein at approximately 4:30 p.m. on September 14, 1961, started bathing in his living quarters at the said hotel; that the bathtub was a four-legged old-fashioned type tub with an oval-like contour and failed to set properly on the floor; that for the past fifteen years the claimant had been accustomed to the use of a modern rectangular-type bathtub; that when the

claimant stood up from a sitting position on the rim of the tub, he sustained the injury, as found above; that the injury was reasonably associated with the environment created by the said specific errand and arose out of an ordinary incident which the employer would normally contemplate as occurring in the course of the errand;

11. That the injury arose out of and in the course of the employment;

12. That written notice of injury was not given to the employer within thirty days, but that the employer had knowledge of the injury and has not been prejudiced by the lack of such written notice;

13. That as a result of the injury the claimant required and secured medical treatment and care; that the employer and the insurance carrier are liable for the reasonable cost of all medical treatment and care required by the claimant as a result of the injury;

14. That the average weekly wages of the claimant herein at the time of the injury were $165;

15. That as a result of the injury the claimant was wholly disabled from September 26, 1961 to March 31, 1962, inclusive, less 18 days he worked without any loss in earnings, 24-1/7 weeks, and for such temporary total disability he is entitled to compensation at the maximum rate of $70 per week in the amount of $1,690;

16. That as a result of the injury the claimant continues to experience pain in the left lumbar area of the back, which pain radiates into his left leg, requires the use of a back brace, and has limitation of motion in forward and backward bending; that the claimant has a partial disability attributable to the injury and such disability is permanent; that for such permanent partial disability the claimant is entitled to compensation under section 8 (c) (21) of the Act;

17. That on April 1, 1962, the claimant retired from his regular employment as a bus driver with the D. C. Transit System, Inc.; that the claimant has not had any regular employment since April 1, 1962; that, having due regard to the nature of the injury, the degree of physical impairment due thereto, his usual employment, and other factors which

may affect his capacity to earn wages in his disabled condition, including the effect of such disability as it may extend into the future, the claimant's wage-earning capacity is, in the interest of justice, fixed under section 8 (h) of the Act at $123.75 per week based upon a 25 per cent impairment of the capacity he had to earn wages prior to the injury;

18. That the claimant is entitled to compensation for permanent partial disability, as found above, at the rate of $27.50 per week (66-2/3 per cent of $41.25, the difference between $165, the average weekly wages at the time of the injury, and the reduced weekly earning capacity of $123.75) beginning April 1, 1962, and continuing subject to the limitations of the Act;

19. That accrued compensation due the claimant for temporary total disability amounts to $1,690, as found above, and for permanent partial disability at the rate of $27.50 per week from April 1, 1962 to February 16, 1963, inclusive, 46 weeks, amounts to $1,265, or a total of $2,955;

20. That the employer and the insurance carrier have paid nothing to the claimant as compensation;

Upon the foregoing findings of fact, the Deputy Commissioner makes the following

AWARD

That the employer, Amalgamated Association of Street, Electric Railway and Motor Coach Employees, Division 689, and the insurance carrier, St. Paul Fire and Marine Insurance Company, shall pay to the claimant herein compensation as follows: For temporary total disability, 24-1/7 weeks at the rate of $70 per week, from September 26, 1961 to March 31, 1962, inclusive, less 18 days worked without any loss in earnings, in the amount of $1,690; and for permanent partial disability, 46 weeks at the rate of $27.50 per week, from April 1, 1962 to February

16, 1963, inclusive, in the amount of $1,265, or a total of $2,955, which amount is due and payable forthwith; and thereafter shall continue payments of compensation to the claimant for permanent partial disability at the rate of $27.50 per week, payable in biweekly installments, subject to the limitations of the Act or until further order of the Deputy Commissioner.

The employer and the insurance carrier shall also pay for the reasonable cost of all medical treatment and care required by the claimant as a result of the injury.

* * * * *

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

2

U. S. DEPARTMENT OF LABOR
BUREAU OF EMPLOYEES' COMPENSATION
DISTRICT OF COLUMBIA COMPENSATION DISTRICT

In the Matter of the Claim for Compensation under the District of Columbia Workmen's Compensation Act:	
CLARENCE L. GREENWELL, Claimant,	
vs.	Case No. 24818-2
AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA, DIVISION 689, Employer,	
ST. PAUL FIRE AND MARINE INSURANCE COMPANY, Insurance Carrier.	

Room 400, Colonial Building,
1156 15th Street, N. W.,
Washington, D. C.
Friday, January 4, 1963

Pursuant to notice, this matter was heard before the Honorable HERMAN ADLER, Deputy Commissioner of the U. S. Department of Labor, Bureau of Employees' Compensation, at Washington, D. C., commencing at 10:07 o'clock a.m.

APPEARANCES:

For the Claimant: MARTIN E. GEREL, ESQ.,
925 Fifteenth Street, N. W.,
Washington, D. C.

3 For the Respondents: WILLIAM J. DONNELLY, ESQ.,
1215 Nineteenth Street, N. W.,
Washington, D. C.

4 PROCEEDINGS

THE DEPUTY COMMISSIONER: Well, gentlemen, is there any reason why we can't get started?

MR. GEREL: None at all.

THE DEPUTY COMMISSIONER: This hearing is being held upon the application of the claimant, Clarence L. Greenwell, 2605 Elmont Street, Silver Spring, Maryland.

From the information in the file, it appears that on November 5, 1962, Clarence L. Greenwell filed claim against the Amalgamated Association of Street, Electric Railway, and Motor Coach Employees of America, Division 689, with offices at 900 F Street, Northwest, Washington, District of Columbia, for benefits under the District of Columbia Workmen's Compensation Act alleging that on September 14, 1961, while employed as an executive board member and shop steward for the said association and while attending the association's convention at the King Edward Hotel in Toronto, Ontario, Canada, as an authorized alternate delegate of the association, he sustained personal injury resulting in his disability when he slipped and fell in the bathtub while taking a bath in the said hotel where he also had lodgings during his stay for the convention, as a consequence of which he suffered trauma to the lower part of his back.

It appears further that the association had knowledge of the injury on the date of its occurrence.

5 Mr. Martin E. Gerel, as counsel for the claimant, will you please state the full claim.

MR. GEREL: The claim, Mr. Commissioner, is for temporary total disability compensation for all time lost from November 15 -- September 15th through November --

THE DEPUTY COMMISSIONER: Excuse me, is that a correction? September 15th?

MR. GEREL: Temporary total from September 26 through November 24th, intermittently. The exact dates would have to be determined.

And from November 25th until -- I suppose you might say yesterday when I obtained an estimate of permanent partial disability from Dr. Ammerman. And so as of today and until the future, permanent partial disability of the body as a whole of 20 percent; and also medical care and attention.

THE DEPUTY COMMISSIONER: Now, starting September 26th as the first day for which compensation is being claimed for temporary total disability -- is that 1961?

MR. GEREL: 1961. Yes.

THE DEPUTY COMMISSIONER: To November 24th, 1961?

MR. GEREL: Intermittently during that period.

THE DEPUTY COMMISSIONER: Now with reference to medical expenses, is there a claim for medical expenses incurred prior to the present? Or is that --

MR. GEREL: Yes.

THE DEPUTY COMMISSIONER: Or is that for any additional?

6 MR. GEREL: It is for all reasonable medical expenses that have been incurred and for such medical expenses as may be required in the future.

THE DEPUTY COMMISSIONER: Now, for the period from November 25, 1961, to the present, is that intermittent also?

MR. GEREL: No. That is total.

THE DEPUTY COMMISSIONER: Straight?

MR. GEREL: Yes.

THE DEPUTY COMMISSIONER: That's straight.

MR. GEREL: And that would be through January --

THE DEPUTY COMMISSIONER: That's a straight period.

MR. GEREL: Through January 3, 1963, and permanent partial beginning today, January 4, at 20 percent under 8(c)21.

THE DEPUTY COMMISSIONER: May I ask if there is any question here as to wages?

MR. GEREL: I think, Mr. Commissioner, both sides have agreed to stipulate to all matters except two.

One: Was the claimant an employee at the time of the alleged accident, and --

THE DEPUTY COMMISSIONER: Well, let me hear what the wages are that you believe that Mr. Donnelly, as counsel for the respondents, will stipulate to.

MR. GEREL: I think Mr. Donnelly might stipulate to wages as $165 per week, based upon withholding statements that are available here indicating Mr. Greenwell, who had earned from the D. C. Transit

7 and the respondent the approximate sum of $6800-$7000 in 1960 and 1961. In 1961, the exact earnings were $6938. This would, of course, cover the period during which Mr. Greenwell worked and does not include all of the time that year from November 25 until the end of the year, a period of approximately five weeks, and the lost time between September 25th and November 24th of 1961.

I calculated it on the basis of 42 weeks, an average of $165 per week.

THE DEPUTY COMMISSIONER: All right, we will let that stand until we go further.

The employer and the insurance carrier, Saint Paul Fire Marine Insurance Company, have controverted the claim. Mr. William J. Donnelly, Jr., as counsel for the respondents, will you please state the grounds of controversy.

MR. DONNELLY: That while the claimant was in Toronto, Canada, he did not have or enjoy the status of an employee in the terms of the Workmen's Compensation Act; and, secondly, if he did enjoy such status, that at the time and place of the accident complained of, that the accident did not arrive out of and in the course of his employment.

Now I would want to state for the record that I will agree that Mr. Greenwell's average weekly earnings, as stated by his attorney, were approximately $165, of which approximately $1,700 of his yearly earnings were from his duties in connection with the union.

8 I will stipulate and agree that if Dr. Ammerman were here to testify that he would testify that this man has a permanent impairment of 20 percent to the back.

MR. GEREL: I wonder, Mr. Commissioner, while we are on the stipulations, whether we can further stipulate that there was an accident? There is no question about the occurrence of an accident?

MR. DONNELLY: I will agree that an accident occurred.

THE DEPUTY COMMISSIONER: All right.

MR. GEREL: At the time and place indicated?

MR. DONNELLY: Yes.

MR. GEREL: And in the manner indicated?

MR. DONNELLY: I will agree that an accident occurred in Toronto, Canada, at the King Sheraton -- whatever is was -- Hotel.

THE DEPUTY COMMISSIONER: Then in accordance with the positions as stated by the representative for the respective parties, it is understood that the respondents deny that there was an employee-employer relationship on September 14, 1961, when Mr. Greenwell did have an accident, as previously stated.

The employer and the insurance carrier also deny that the injury arose out of and in the course of employment.

The employer and the insurance carrier agree that the wages consisting of the claimant's earnings from the D. C. Transit and from

9 the aforesaid association amounts to $165 per week. However, counsel for the respondents makes the further point that only $1,700 was earned for one year immediately preceding the injury from the said association.

I understand further that Mr. Donnelly, on behalf of the respondents, does not intend to contest the extent of the claimant's physical impairment that may have resulted from the accident that occurred on September 14, 1961.

MR. DONNELLY: That is correct, sir.

THE DEPUTY COMMISSIONER: Let me ask you this further question, Mr. Donnelly, in the event that it is found that the employee-employer relation did exist and that an injury did arise out of and in the course of employment, will the respondents be agreeable to pay for the reasonable value of all medical treatment incurred?

MR. DONNELLY: Yes, sir. With one modification to our position on disability, the claim, as I understand it, is for temporary total from date of the accident to date. I will agree that the claimant would have been temporarily totally disabled from the time of the accident until the time of his retirement as a bus driver on April 1, 1962, and that at that time his degree of impairment in the amount of 20 percent resulted.

THE DEPUTY COMMISSIONER: Do I understand, Mr. Donnelly, the respondents take issue with the claim of temporary total disability after April 1, 1962, to January 3, 1963?

MR. DONNELLY: Yes, sir.

THE DEPUTY COMMISSIONER: But the respondents do not intend to contest the claim for temporary total disability from September 26, 1961, to November 24, 1961, for intermittent periods and for the complete period of November 25, 1961, to April 1, 1962?

MR. DONNELLY: That is correct.

THE DEPUTY COMMISSIONER: Do the parties understand the issues?

MR. DONNELLY: Oh, there is one other statement I think I should state for the record. Ordinarily if would be our position that a shop steward, such as this man was in connection with the union, would not be an employee of the union. However, in this particular instance, a premium was paid by the union to cover people such as Mr. Greenwell who were shop stewards. Therefore we realize we would be estopped to deny the existence of an employee relationship, having accepted a premium. However, in this particular instance, while Mr. Greenwell was in Toronto, Canada, he was not an employee of the union, did not enjoy that status. I just wanted to clarify that for the record, sir.

THE DEPUTY COMMISSIONER: Well, I assume, then, that that may be something that you may prove.

MR. DONNELLY: Yes, sir.

THE DEPUTY COMMISSIONER: In connection with your testimony.

All right, Mr. Gerel, are you prepared to proceed with your first witness?

MR. GEREL: Yes.

Will you swear the witness, please.

Thereupon,

CLARENCE LODIS GREENWELL

was called as a witness for and on his own behalf and, having been first duly sworn, was examined and testified as follows:

THE DEPUTY COMMISSIONER: Will you state your full name and full address?

THE WITNESS: Clarence Lodis Greenwell, 2605 Elmont Street, Washington, D. C.

THE DEPUTY COMMISSIONER: Did you say Washington, D. C.?

THE WITNESS: No, I am sorry, Silver Spring.

THE DEPUTY COMMISSIONER: Silver Spring, Maryland?

THE WITNESS: Yes. Correct that.

THE DEPUTY COMMISSIONER: All right.

DIRECT EXAMINATION

BY MR. GEREL:

Q. Mr. Greenwell, how old are you? A. I will be 61 in March, March 29th.

12 Q. As you know, we are inquiring here regarding a claim that you have made for compensation benefits.

Mr. Greenwell, what was the nature of your employment in 1961 and prior thereto? A. Shop steward, since 1944. Then I have been board member since 1950.

Q. You are referring to your employment with the respondent, the association? A. That is correct.

Q. You had other employment as well? A. D. C. Transit.

Q. In what capacity? A. Well, mostly as a bus driver and street-car operator.

Q. How long had you been employed by D. C. Transit when you were retired in April of 1962? A. I got hired November 18, 1935; 26 years and 4 months I worked for them.

Q. Was this regular employment? A. Yes, sir.

Q. And for how long a period of time have you been a member of the association? A. Since 1936, January 1st.

Q. Mr. Greenwell, as a shop steward and as a board member, did you receive any compensation from the association? A. No, sir, only the regular salary.

Q. A regular salary? A. Yes, sir.

13 Q. From whom? A. Division 689.

Q. From the association? A. Yes.

Q. And what was that regular salary in 1961? A. Well, I just can't exactly say how you explain, because every time we got an increase, it went up a little bit. Now, the last check I got, the best I can remember after they took everything out of it, I got $65-some-odd-cents a month. That was shop steward and one-day board meeting. It was about $84 total.

Q. For what period? A. That was for 30 days.

Q. For 30 days? A. Yes, sir.

Q. How regularly are you paid this so-called salary? A. Once a month.

Q. By check? A. Yes, sir.

Q. Is this a check drawn on the association? A. That is correct.

Q. You say you have been a board member since 1950? A. Yes.

14 Q. Can you tell us whether or not you have been drawing a salary as a board member from the association since that time? A. That's correct.

Q. Do you know, Mr. Greenwell, whether or not the association made any deductions from your salary, such as withholding tax, Social Security, et cetera? A. Yes, sir, it did.

Q. Now, Mr. Greenwell, as a board member, were you expected or required to attend any of the annual conventions of the association? A. Yes, sir, supposed to be there at all times the convention is going on.

Q. And had you attended such conventions since you became a board member in 1950? A. Yes, sir, every two years.

Q. Who determines where the convention shall be held? A. The delegates at the international convention every two years, they vote on it, what city they are going to next following two years.

Q. In September of 1961, a convention was being held in Toronto, Canada; is that not correct? A. That's right.

Q. King Edward Hotel? A. Yes, sir. That's right.

15 Q. Do you know whether or not the association made the arrangements for the holding of the convention there? A. The international, not Division 689. They take care of handling that.

Q. The international, of which this division is a member? A. That is correct.

Q. During the attendance at such a convention by the board members, Mr. Greenwell, do the members receive their regular salary? A. They receive their day's pay, whatever the day's pay as a board member is, and they are allowed so much a day for expenses, and also --

Q. Do we understand, then, that in addition to the regular salary, the members are paid an additional sum to cover their expenses while attending the convention? A. That is correct.

Q. Was this -- excuse me. A. Also they paid expenses, traveling expenses up and back, train fare.

Q. The fare to the place of the convention, the expenses at the convention? A. That's right.

Q. Room and lodging? A. That's right.

Q. And fare back to your -- A. That's correct. That's railroad fare now.

16 Q. Yes, sir. Can you tell us Mr. Greenwell, whether this was paid in September 1961, for the convention at King Edward Hotel? A. Yes, sir, it was. I don't know the exact date.

Q. I show you this, which appears to be a check, Mr. Greenwell. Can you identify it for us, please? (Showing document to witness). A. Yes, sir, that's the one I got.

Q. This check is dated September 1, 1961, and it is on the check stationery of the association.

What is it intended to cover, do you know? A. That's to -- let's see. (Document handed to witness)

I can't -- of course, because we got two of them. I don't know whether this was all.

Mr. Steele, over there, the secretary, could explain to you exactly what this covered.

See, you have got $416.92 and here is the reduction, and this is your Social Security, Federal Tax.

Q. Can you tell us whether -- excuse me. A. This is the total after everything was out, $311.65.

Q. Can you tell us whether this covers the salary which you were receiving, your attendance at the convention, both, or neither? A. I can't tell you exactly which one it is.

17 Q. Are you paid in advance for the convention attendance? A. Yes, before we go.

Q. Do you recall the dates of the convention? A. Yes, the second Monday of -- the first Monday after Labor Day, I think it was around the twelfth if I am not mistaken.

MR. GEREL: I offer this check into evidence, Mr. Commissioner.

MR. DONNELLY: No objection.

MR. GEREL: Counsel for respondents has already seen it.

THE DEPUTY COMMISSIONER: There being no objection from counsel for the respondents, this voucher, Order No. 4505, dated September 1, 1961, signed by Walter J. Bierwagen, on behalf of the Amalgamated Association of Street, Electric Railway, and Motor Coach Employes of America, will be admitted into the record as Claimant's Exhibit A.

(Voucher, Order No. 4505, dated September 1, 1961, for $311.65, referred to, was marked Claimant's Exhibit A and received in evidence.)

THE DEPUTY COMMISSIONER: This is a voucher; it isn't really a check?

THE WITNESS: No.

MR. GEREL: Is there a check which corresponds to this which you endorsed?

THE WITNESS: Yes.

(Discussion off the record.)

18 THE DEPUTY COMMISSIONER: That is Voucher Order No. 4505 from the Treasurer, Division 689.

You may proceed, Mr. Gerel.

BY MR. GEREL:

Q. Mr. Greenwell, how many days were allotted for the convention, do you know?

We are talking about the convention of September 1961. A. I believe 12 days, 13 -- 12 or 13 days. Seven days for the convention, and you are allowed most of the time two going and two coming. Then they give you extra. I would say 12 days.

Q. Are you paid the daily allowance for each of the 12 days? A. Yes.

Q. Or for only the days you are actually at the convention? A. No, sir, 12 days.

Q. Mr. Greenwell, on what date did the accident happen? A. September 14th, 1961.

Q. Give us some details about what did happen. A. Well, I went down, I would say around 4:00, 4:30, to take a bath, because we were going to have a banquet that night, and I sat up on this tub and washed my feet from the knees down. And when I got up to -- I had the shower

19 running up top and when I got up, I slipped. When I slipped, I just turned around. When I tried to catch myself, I fell on this side (indicating).

THE DEPUTY COMMISSIONER: Pointing to the --

THE WITNESS: Left side.

THE DEPUTY COMMISSIONER: Left side?

THE WITNESS: Yes.

THE DEPUTY COMMISSIONER: Is that the hip or back?

THE WITNESS: Right across the top of the hip here (indicating).

BY MR. GEREL:

Q. Is the banquet or is it not a part of the convention? A. Yes, sir.

Q. Has it been in every convention you have attended? A. Yes, sir.

Q. Other than what we normally understand to occur at a banquet, good food and some drink and much entertainment, is any activity engaged in in connection with company or association business? A. Well, they have speakers, most all banquets. Sometimes they have a congressman or, like up there, they had some delegates at Vancouver, I think one of the main speakers up there came in from Vancouver, and the other one was Senator Morse.

20 Q. The speaker from Vancouver you say was a delegate? A. No. No, no, no, like congressman or mayor or something up there.

Q. And are these speeches of special interest, or are they not, to the association in connection with the interests of the association? A. Well, if you get the transit man speaking up there, the owner of a transit company, I would say that would be 50-50. And the majority of the speakers, if we get them, they are for us, speak for the local.

Q. I see. A. Labor people. That's what I would put it.

Q. As a board member attending the convention, is it expected of you, or is it not, that you also attend the banquet? A. Yes, sir.

Q. Can you give us some general description, Mr. Greenwell, of this bathtub? Not in too much detail, but just so we get the flavor of the King Edward Hotel bathtub. A. It is an old-timey bathtub I call it. It has four legs, don't set right on the floor. It is that high (indicating), and around the top it has a rim around that size, about (indicating).

THE DEPUTY COMMISSIONER: Would you say that rim you are indicating would be about, what, 1-1/2 inches or 2 inches wide?

THE WITNESS: Yes, sir, something like that.

21 Then the tub slopes down. It doesn't go exactly straight on the side, it slopes down (indicating), and I would say the bottom of it is kind

of round. It is not real flat. And just -- the back of it, it slopes down like that (indicating), gradually.

THE DEPUTY COMMISSIONER: It almost sounds the way you are describing it, it almost comes close to being an oval shape.

THE WITNESS: Almost, yes, sir.

THE DEPUTY COMMISSIONER: Is that bathtub peculiar to you?

THE WITNESS: Well, in one sense of the word it is because the one I got is one of those new ones, the flat type, you see.

THE DEPUTY COMMISSIONER: What do you mean, the one you have?

THE WITNESS: The house now.

THE DEPUTY COMMISSIONER: What type is that?

THE WITNESS: One of those new ones, I would call it, one with the wide top that sets low to the floor.

THE DEPUTY COMMISSIONER: Is that any different than the one you were using at the hotel, at the King Edward Hotel?

THE WITNESS: Oh, yes, I would say so, a whole lot different. Because this other one up at the King Edward Hotel is at least 6 to 8

22 inches higher from the floor.

THE DEPUTY COMMISSIONER: All right, you can continue, Mr. Gerel.

BY MR. GEREL:

Q. Mr. Greenwell, who paid the expenses of the banquet? A. I can't exactly answer that one because I don't know.

Q. Well, did you pay for any of it? A. No, sir. Whether the local paid for it or the international, I don't answer that.

Q. Your testimony is that it would be either the association or the parent organization of the association? A. That's right.

THE DEPUTY COMMISSIONER: The parent organization, is that the international?

THE WITNESS: Yes, sir.

THE DEPUTY COMMISSIONER: Could you give us the full name of that?

THE WITNESS: Look on that check there, the check will tell you.

THE DEPUTY COMMISSIONER: Are you referring to Exhibit A, put into the record on your behalf; would that be the International Amalgamated Association of Street, Electric Railway, and Motor Coach Employes of America?

THE WITNESS: That is correct, yes, sir.

THE DEPUTY COMMISSIONER: All right.

23 BY MR. GEREL:

Q. Mr. Greenwell, you indicated that you were paid a daily wage while you attended this convention in addition to the normal salary with the association. You may have answered this and I didn't catch it before: Is that daily wage merely to make up to you what you lose from the D. C. Transit Company? Is it less or is it more? A. No; the rate of the board pay, when we are down there one day a month, whatever that pays on that board, the whole time we are away we get paid the regular board pay for each day.

Q. Each of the so-called 12 days? A. Whether it is more than Capital Transit pays us or a little less than D. C. Transit now.

Q. You were taking a bath for what purpose, Mr. Greenwell? I know, to be clean, but -- A. To go to the banquet.

Q. Yes. Did you actually attend the banquet? A. Yes, sir. Part of it. I didn't finish it out.

* * * * *

24 Q. Mr. Greenwell, who made the reservation at the King Edward Hotel for your stay there? A. The Local 689, Mr. Henry Steele, secretary.

Q. Made the reservation for you? A. For all of us.

* * * * *

25 CROSS EXAMINATION

BY MR. DONNELLY:

Q. As a shop steward, you are elected to that position by the other bus drivers, members of the union; is that correct, sir? A. Yes, sir.

Q. And as a shop steward, your job is to represent the members of the union in connection with their gripes, their problems with the Transit Company? A. That is correct.

Q. You are a union man in that sense? A. Yes, sir.

Q. You are not a paid employee of the office staff of the union itself, though, are you? A. I don't understand just what you --

Q. You are not a member of the union staff? A. No, no, no. You know, just -- we are paid by the month. We have to be there the whole month to answer questions when we are there. If you are home, they call you at home to ask the questions, same thing.

26 Q. You are elected by the membership, though, who are not employees of the union? A. Everybody is an employee of the union.

Q. In other words all the members of the union, as far as you are concerned, are employees of the union? A. That is correct.

Q. But your job as a shop steward is the usual union shop steward job, is that correct? A. Yes.

Q. Now, when this convention was scheduled in September 1961, it was set up in Toronto, Canada; right? A. Yes, sir.

Q. You, I assume, looked forward to this trip, in going to Canada? A. Everybody looked forward to it, not only me.

Q. It is a big thing, you all look forward to the fun of it, pleasure, just going to Canada? A. I wouldn't say for the fun of it; you are going up there to represent your local.

Q. But you get your pay from the union under union rules while you are up there representing the union? A. If you don't go up there, you get that pay here, wherever you go. Even if you stay here, the union pays you.

Q. I am just talking about while you are on the convention.

A. Yes, sir.

27 Q. Because of the fact while you are away like that, D. C. Transit isn't going to pay you; isn't that right? A. No.

Q. They don't pay you while you are away? A. They don't pay you while you are here if the union takes us off.

Q. Right. So the union gives you a pay scale which is equivalent to the international recommended daily pay rate for bus drivers, isn't that right? A. No, I wouldn't say that, because the international don't have anything to do with -- we make our own pay -- vote for our own pay down in the union office; the board members votes on it. And the membership, they approve of it.

Q. In other words, you vote your own pay to compensate you while you are representing the union men? A. And it goes back to the membership and they approve of it.

Q. Right. And that pay that you get is supposed to cover your loss of income because you wouldn't be getting anything from the Transit Company, right? A. That's right. We get our day's pay.

Q. Now, two years before, 1961, 1959, you had a convention; is that right? A. Yes, sir. Every two years.

Q. And you attended that? A. Yes, sir.

28 Q. Now, at that time, wasn't one man required to stay here out of the board members? One man couldn't go along? A. I believe so, yes, sir.

Q. You have ten board members, right? A. Right.

Q. Only nine went? A. According to how many you had.

Q. In other words, your local union would only permit, or the membership of the local union would only permit nine members to go along to one of these conventions according to international rules; right? A. Right.

Q. All right. Now, as a result of this problem in 1959, wasn't someone very much upset because he couldn't go along on that convention in 1959? A. I don't know. I couldn't answer that.

Q. All right. Now, in 1961, at the convention in Canada, only nine members were supposed to go; isn't that correct? A. Yes.

Q. How many went? A. Ten.

Q. All right. A. The membership voted for that.

29 Q. I understand. But now, didn't you go along, sir, strictly as a guest of the union so that you would have the opportunity to go to Canada? A. No, sir. I wouldn't say that. I went as an alternate.

Q. You performed no functions, or had no duties whatsoever; isn't that correct? A. No, sir. I had no chance to vote, only the chance I had in case a man got sick, I was there to take his place. And I attended all meetings.

Q. Sir, but wasn't that just a device to give you the benefit of going along on this trip so your feelings wouldn't get hurt? A. I wouldn't say that; no, sir.

Q. You would have been very disappointed if you hadn't have gone along on this trip to Canada on a full -- being paid for every day you were gone, wouldn't you? A. No, sir, I would not.

Q. During the time that you were in Canada, you didn't perform one duty for that union? You had no official capacity whatsoever; isn't that true, sir? A. I was in all meetings, same there as the rest of them.

Q. Granting you were attending them, but you had no official capacity? You took no position, you had no duties whatsoever; isn't that correct? A. Come right down to voting, I would not.

30 Q. All right. Now, you were paid in advance, as you stated, so you would have enough money to cover your expenses while you were up there and not have to delve into your own pockets; isn't that correct? A. Well, --

Q. Your expenses were paid? A. You were paid; if you used more than that, that was up to you.

Q. Now, you stayed at the King Edward Hotel in Toronto? A. Yes, sir.

Q. That is a modern hotel? As a matter of fact, it is one of the Sheraton chain, isn't it? A. Yes, sir.

Q. How many stories has the Sheraton Hotel there? A. I couldn't exactly say. I think it is somewhere around 17 or 18.

Q. And what floor were you on? A. Fifth.

THE DEPUTY COMMISSIONER: You are still talking about the King Edward Hotel when he says Sheraton?

THE WITNESS: Yes.

BY MR. DONNELLY:

Q. Sheraton chain. A. Yes, I understand.

Q. This is a darn nice hotel, isn't it? A. Well, I would be foolish to sit here and say it wasn't, whether it would be or wouldn't be.

31 Q. Now, as I understand it, sir, there was a banquet on the evening of this accident which was set for 9:00 o'clock; right? A. Eight-thirty or nine, somewhere around there. I don't remember what time.

Q. Now, Mr. Greenwell, isn't it a fact that the banquet was strictly entertainment? A. No, sir. It had some speakers to it.

Q. Granted there were speakers, they usually have them, but doesn't the banquet come within the classification of strictly entertainment as far as you fellows of the union were concerned? A. Well, yes, sir, I would have to say that.

Q. All right, sir. Now, as I understand it, when this accident occurred, you were in the tub and you slipped while you were in a bathtub? A. That is correct.

Q. Right. A. Yes, sir.

Q. And you talk about this bathtub not being like the one that you have in your home, is that because the one you have in your home is one of these modern-day bathtubs like were put out in the last 15 years or so? A. Yes, sir.

32 Q. All right. Now, you are 61 years of age and I assume you have had plenty of experience with the old-time bathtubs that had legs on them. A. Yes, sir.

Q. And the old-time bathtub, with legs on them, is the kind that was up in the King Edward Hotel, right? A. Right.

Q. Okay. Now with regard to this banquet, you weren't required to be at that banquet, were you? A. Well, I don't know that we were required; no more than the rest of them. You could have been excused.

Q. You didn't have to be excused from a dinner, from entertainment, did you? A. Well, I don't know if you would have to. I wouldn't answer that one.

Q. I assume, sir, that like most of us, you like to take a bath or shower once a day? A. Yes, sir.

Q. And the usual thing is to take a bath and shower after working hours? A. Most of the time, yes.

Q. Is that your habit? A. Mostly, yes, sir.

Q. Incidentally, the King Edward Hotel in Toronto, Canada, was that a nice air-conditioned hotel? A. Yes, sir.

33 Q. And had you been in the hotel most of that day? A. All day.

Q. And the day's function, when that stopped as far as the union was concerned, was that about four o'clock? A. Four or five o'clock. Sometimes it ran a little longer, five-thirty.

Q. Everybody had knocked off by the time you went up to take a shower, is that right? A. That's right, getting ready for the banquet.

Q. Is this your application for benefits to the employees' Transit Welfare Fund of the Transit Company? (Handing document to witness) Is that signed by you? A. That's mine; yes, sir.

MR. GEREL: I think we are prepared to stipulate that Mr. Greenwell had also applied to the respondent for welfare benefits, if that will accelerate matters.

MR. DONNELLY: All right.

I would like to have the document placed into evidence, but in order that I might get it back to the gentleman who has possession of it who is not an employee of the union, may I read it into the record in lieu of that? If you have no objection.

MR. GEREL: I would want to see it.

THE DEPUTY COMMISSIONER: I believe Mr. Gerel -- well, I don't know what is in there so let Mr. Gerel look at it and if he has no

34 objection, we will let you read it into the record.

MR. DONNELLY: No objection?

MR. GEREL: No.

MR. DONNELLY: May I read it into the record, sir?

THE DEPUTY COMMISSIONER: Mr. Gerel, any objection to reading that statement into the record?

MR. GEREL: No, I have no objection. We don't agree with everything that is in it as factual under the circumstances, but I have no objection to Mr. Donnelly reading it into the record.

(Discussion off the record.)

THE DEPUTY COMMISSIONER: Back on the record.

MR. DONNELLY: I offer these photostats of the original record of a document entitled Application for Benefits from the Transit Employees' Health and Welfare Plan, signed by Mr. Greenwell, into evidence.

So that I may return the original to the person having custody of it, I offer these photostats.

THE DEPUTY COMMISSIONER: Mr. Gerel, any objection to admitting into the record copy of, photostat copy of Application for Benefits from the Transit Employees' Health and Welfare Plan, signed by C. L. Greenwell?

MR. GEREL: We admit that this is an application prepared by Mr. Greenwell. We do not, however, admit that it contains --

35 THE DEPUTY COMMISSIONER: Well, it will be admitted for whatever it contains.

MR. GEREL: -- evidence bearing necessarily on the issues.

THE DEPUTY COMMISSIONER: You have no objection?

MR. GEREL: I have no objection to it being in the record. I do not agree that it contains evidence on the issues.

THE DEPUTY COMMISSIONER: All right, the proffered exhibit is admitted as Respondents' Exhibit Number 1.

(Application for Benefits, signed by C. L. Greenwell, dated 12-27-61, was marked Respondents' Exhibit No. 1 and received in evidence.)

THE DEPUTY COMMISSIONER: Mr. Donnelly, you may proceed.

MR. DONNELLY: Thank you.

BY MR. DONNELLY:

Q. And subsequent to putting that application in, which we have just referred to, sir, you obtained benefits from the union for 13 weeks at $20 a week, plus all of your medical bills being paid for; isn't that

correct, sir? A. All I went to the Health Center, but outside I didn't.

Q. All right. A. And $20 a week, remember they took out the monthly dues out of that, too. I didn't get the whole $20.

36 Q. All right. A. $9 -- first it was $10.50 for a month and after you got retired, it was $9.25; so originally $10.50 come out of that $20 a week.

* * * * *

REDIRECT EXAMINATION

BY MR. GEREL:

Q. Mr. Greenwell, as an alternate member to the convention,

37 were you an alternate to any particular member or would you have functioned in the event any of the members became ill? A. That is correct.

Q. And in that capacity, would you then discuss, and otherwise act as fully as a voting member? A. Yes, sir.

Q. Who might have become ill? A. Yes, sir.

Q. And in order to participate in such voting, would it be necessary that you attempt to know what is going on and what you would have to vote upon? A. Yes, sir.

Q. And did you do all of this? A. Yes, sir.

Q. Mr. Greenwell, there was admitted into the record an application that you made to the Health and Welfare Fund of the association. Why didn't you apply for Workmen's Compensation? A. I didn't know we even had Workmen's Compensation.

Q. Excuse me. Go ahead. A. Never knowed that for six or eight months, -- until after we got you into it, got to talking to you in it and you looked it up. Even the union never had mentioned about Workmen's Compensation.

MR. GEREL: I would like to offer into the record, Mr. Commis-

38 sioner, this letter from Mr. Richeson to Mr. Greenwell dated a day or two after, it was past Christmas, December 1962.

MR. DONNELLY: No objection.

* * * * *

THE DEPUTY COMMISSIONER: All right, the said photostat of the letter of December 27, 1962, just recited, will be admitted into the record as Claimant's Exhibit B.

(Letter dated December 27, 1962, signed by Leon D. Richeson, was marked Claimant's Exhibit B and received in evidence.)

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RECROSS EXAMINATION

49 BY MR. DONNELLY:

* * * * *

50 Q. All right. Now, just go back to one thing for a moment. You stated you were an alternate to this convention, is that correct? A. Yes.

Q. Officially there wasn't any such bird as an alternate, isn't that a fact, sir? In other words, weren't you up there as an alternate solely so that the union could get you to Toronto, Canada, so you wouldn't be

51 left out in the cold; isn't that a fact? A. No, sir. No, sir.

Q. You, as a union member of this so-called executive board, know that the union could only send, according to the international rules, only nine representatives to the convention; right? A. Right.

Q. And there wasn't any alternate provided for under those circumstances, was there? A. This union can send as many as they want as long as their membership votes for it.

Q. Correct. But you went up there because they didn't want to leave you here in Washington? A. Wasn't particularly me, it could be anybody. I volunteered to take the job.

Q. You volunteered to go. A. As an alternate.

Q. But you wanted to go? A. As an alternate.

Q. You wanted to go to Toronto, right?

MR. GEREL: I presume, Mr. Commissioner, Mr. Greenwell went because he wanted to go.

THE DEPUTY COMMISSIONER: Mr. Donnelly, I don't think we have to belabor the point.

* * * * *

52 THE DEPUTY COMMISSIONER: You mentioned something about the bathtub being high, whereas the bathtub you have at your home is set into the floor or sunk into the floor; is that correct?

THE WITNESS: Yes, sir.

THE DEPUTY COMMISSIONER: How high was that bathtub?

THE WITNESS: Don't quote me for being exact, I would say something around 2 feet off the floor, something like that.

THE DEPUTY COMMISSIONER: Two feet?

THE WITNESS: About 2 feet, 20 inches to 2 feet.

THE DEPUTY COMMISSIONER: And you say it was set on legs? Four legs?

THE WITNESS: Yes, sir.

THE DEPUTY COMMISSIONER: You were taking a bath and I think you stated you were sitting on the rim. Is there any reason why

53 you would be sitting on the rim?

THE WITNESS: I always wash my feet first to start with.

THE DEPUTY COMMISSIONER: Then you intended to sit in the tub?

THE WITNESS: No, sir, stand up.

THE DEPUTY COMMISSIONER: Stand up? Why wouldn't you sit in the tub?

THE WITNESS: They had the shower hooked up over top.

THE DEPUTY COMMISSIONER: You were going to take a shower?

THE WITNESS: Yes.

THE DEPUTY COMMISSIONER: I see. Now, in slipping and falling, did you slip because of soap or the particular shape of the tub?

THE WITNESS: Well, I don't know that it seemed to be soapy, because I had soap --

THE DEPUTY COMMISSIONER: You couldn't relate the accident to either one of these causes? You are not sure?

THE WITNESS: No, sir.

THE DEPUTY COMMISSIONER: All you know is you slipped and fell?

THE WITNESS: Yes, sir.

THE DEPUTY COMMISSIONER: Now, at this union dinner banquet, which you attended after you took the bath and made other preparations,

54 there are other delegates from other parts of the country that attended that; is that correct?

THE WITNESS: Yes, sir.

THE DEPUTY COMMISSIONER: And, of course, you were there from Division 689?

THE WITNESS: Yes, sir.

* * * * *

THE DEPUTY COMMISSIONER: Was there any point in getting dressed up for the dinner banquet?

THE WITNESS: Oh, yes. Everybody going to a banquet would dress up, wouldn't go in work clothes.

55 THE DEPUTY COMMISSIONER: You wanted to look good?

THE WITNESS: Yes, sir.

THE DEPUTY COMMISSIONER: Did you want to make a good impression?

THE WITNESS: I would say so, for our local.

THE DEPUTY COMMISSIONER: Do you think every delegate wants to make a good impression on the other delegates?

THE WITNESS: I would think they would, yes.

THE DEPUTY COMMISSIONER: In other words, it is pretty much of a routine matter.

Now I heard you testify, or at least I have the impression that you testified to this, that this dinner banquet might be a form of recreation; is that correct?

THE WITNESS: Yes, sir, in a way you could call it.

THE DEPUTY COMMISSIONER: But aside from the speakers which you stated attended the banquet, the other people who were there at the table were all members of this union, delegates; is that correct?

THE WITNESS: At my table, yes, sir. We had two tables.

THE DEPUTY COMMISSIONER: And when you sat at these tables, was there any particular type of discussion that took place?

THE WITNESS: Well, I guess it would.

56 THE DEPUTY COMMISSIONER: It might be social, it might be business, it might be in relation to your union, or it might be purely social or purely personal?

THE WITNESS: All that kind of stuff, yes.

* * * * *

58 THE DEPUTY COMMISSIONER: Now perhaps this is in the record, but I can't refresh my memory. How is a board member placed in that position? Are you elected or are you selected by the union?

THE WITNESS: What position?

THE DEPUTY COMMISSIONER: Executive board member.

59 THE WITNESS: You run for that and the membership votes for that. And the highest vote gets elected.

At this time, they used position this time. But when I was on the board, I got elected. It was just you had as high as 21 or 22 running for the board and the highest got it.

THE DEPUTY COMMISSIONER: Who voted for it? What group?

THE WITNESS: All of the D. C. Transit, 689.

THE DEPUTY COMMISSIONER: In other words, you were elected as a board member, executive board member, representing the employees in that association who are working for the D. C. Transit System?

THE WITNESS: That is correct.

THE DEPUTY COMMISSIONER: And how were you selected as a shop steward?

THE WITNESS: By division, like western division, southeast --

THE DEPUTY COMMISSIONER: When you say western division, you are not talking of Division 689? You are talking of a division within the D. C. Transit System?

THE WITNESS: Yes, but that is still all 689.

THE DEPUTY COMMISSIONER: In other words, there are other shop stewards?

THE WITNESS: Oh, yes, one for each garage or barn, where you work.

* * * * *

60 MR. DONNELLY: Just one question.

BY MR. DONNELLY:

Q. When you were in the tub, before you got up, did you have soap on your feet, sir? A. I couldn't answer that. The water was running.

Q. But you were washing your feet just before you get up and soaped them? A. That is correct. You can't wash them off in clear water.

* * * * *

61 HENRY G. STEELE

was called as a witness on behalf of the respondents and, having been first duly sworn, was examined and testified as follows:

THE DEPUTY COMMISSIONER: Please state your full name and full address.

THE WITNESS: Henry G. Steele, 604 Rolins Avenue, Rockville, Maryland.

* * * * *

DIRECT EXAMINATION

BY MR. DONNELLY:

Q. Mr. Steele, will you please state your occupation. A. I am financial secretary-treasurer and assistant business agent of Local Division 689.

Q. And how long have you been associated with this Local 689? We will call it "the union" from now on. A. Well, in this capacity, for the past 6 years. Formerly for 4 years as an executive board member and secretary of the executive board.

62 Q. Now, were you also associated with the Capital Transit Company? A. D. C. Transit Company, yes. I am an employee on leave of absence from the D. C. Transit Company while serving as an officer in Local Division 689.

Q. And your job with the Transit Company? A. I am a bus operator.

Q. How long have you been a bus operator? A. Since nineteen -- well, let me clarify that by saying that I was employed in 1918 as a streetcar conductor and later, in the 'thirties, made the transition to a bus operator.

Q. Now in September 1961, what was your position with the union at that time? A. Financial secretary-treasurer and assistant business agent.

Q. Were you one of the board of directors? A. No.

Q. Were you an officer of the union itself? A. Yes.

Q. All right. A. Full-time officer.

Q. Was Mr. Greenwell at that time an officer of the union? A. Yes, as in the capacity of a shop steward and executive board member; this is
63 classified as "officers of the union."

Q. Were you full time? A. Yes, sir.

Q. You were full time, a full-time officer of the union? A. That is correct.

Q. Now, sir, in September of 1961, did your local at that time participate in a convention in Toronto, Canada? A. Yes, we did.

Q. Will you please tell the commission just what this convention was all about, the purpose of it, and so on? A. Well, this is an international convention which represents all of the local divisions in the United States and Canada, which convenes every two years in a city designated by the previous convention to discuss an active business coming before the international association.

Q. Now your local, how many people would you send to the convention? Specifically in the year 1961 to Toronto. A. 1961. Our delegates are determined by our membership as of June 30 of the year, of the month preceding the convention in September, and based on our membership at that time of 3,378 members, the first 1,250 members gives us 4 delegates, and then for each 400 members in addition to that, we are allowed one

delegate. So this would give us 9 delegates representing 3,250 members. And we would be short of the tenth delegate by 98 members, which would

64 be the fraction of 400-plus 1. So we had 9 delegates.

Q. In other words, 9 delegates under the international rules could attend the convention? A. That is correct.

Q. Now, how many delegates, that is persons designated as delegates, did your local union have? A. Well, we had in the capacity of the two top officers who are delegates by virtue of their offices, and also eight executive board members who are delegates by virtue of their offices; but must conform with the international law in relation to the number of members which this local division has. So therefore had our membership been of sufficient volume, we would have sent ten delegates; but our membership was such a low ebb at that time, we only had officially nine delegates to send. So one of the delegates had to be eliminated as a delegate.

Q. All right. Now, this biannual convention, is it something that you folks in the locals look forward to? A. I think so. It is one of the highlights of the two-year term. We are elected for two years, and within this two-year term, this international convention takes place.

I think that all of the potential delegates look forward to this trip to some distant city. And I think I can answer that "yes."

65 Q. Does the convention also afford relaxation and pleasure and entertainment in addition to business? A. Well, yes, I think so, for those who are not designated on committees. I think they are more or less at their own discretion except that they are expected to attend all functions of the convention, business meetings, and all other functions.

Q. Now, Mr. Steele, you mentioned that in 1961, for the convention in Toronto, you could only send nine delegates; is that correct? A. That is correct.

Q. How many went? A. We sent ten men.

Q. Why did you send ten men? A. Well, I think as a courtesy. Of course this was a determination made by the executive board. Then

this recommendation was made to the membership and they approved sending the ten, which would include all of the officers who would be eligible to be delegates. However, as I pointed out, due to our low membership, we only had nine official delegates and we had one man extra, so that the membership and the executive board recommended sending the other man, the tenth man.

Q. Now, this tenth man, did he have any duties or any official capacity with the union? A. None whatever.

66 Q. And what was the reason for sending this extra tenth man? A. Well, I think it was to keep good relations and good feeling in the official family and in the membership, because at a previous convention, a member had been denied going to a convention and this seemed to disrupt some of the members and some of the official family as well.

Q. Was Mr. Greenwell a member of the nine official delegates to the convention? A. No, he was not.

May I clarify that by saying --

Q. Yes. A. And may I read an excerpt from the executive board into this proceedings?

Q. Yes. A. Excerpt from the executive board meeting, National Capital Local 689, August 15, 1961, and I quote from these minutes:

"Selection of international delegates: Several methods were discussed as to how the delegates to the international convention would be selected. But before the members of the board could come to an agreed plan of selection, executive board member Clarence Greenwell offered to be the alternate to the convention. So with this declaration, a discussion as to the method of selection was cut off and Brother Greenwell's offer was accepted."

67 So Brother Greenwell made the selection himself. He elected to be the man who was not to be the delegate.

Q. Now, was there any such a thing, officially, as an alternate? A. No. Under our constitution and laws, there is no such thing as an alternate delegate.

Perhaps Brother Greenwell felt that there was such a thing as an alternate delegate and perhaps by stating in the executive board minutes that he would be an alternate delegate, but officially our international association does not provide for alternate delegates.

Q. Now, on this particular trip to Toronto, Canada, this convention, did Brother Greenwell have any official capacity or perform any duties whatsoever for the union? A. No, I can't say that he did. He had no duties outlined for him.

Q. Was it necessary he attend this convention? A. No.

Q. As I understand it, then, the reason for his attending was as a courtesy to him? A. Yes, I think so. I think it would probably have been -- had he not agreed to be the alternate, or if we may clarify that position, the man who was not to be a delegate, then some other one would have had to be selected. So in this particular case where he de-

68 termined that he would be the one who would not go as a delegate, this eliminated making a selection for some other person. But it would have had to be Brother Greenwell or some other member of the executive board who would have had to be eliminated if necessary by a vote of the board.

Q. Now in what capacity, then, was Brother Greenwell insofar as the union was concerned when he was along with you folks in Toronto? A. Well, I think we considered him as a guest of the local division.

Q. Thank you, sir. One other question, the hotel you all stayed in at Toronto, what kind of hotel was that? A. Well, it is rather an old hotel I would say, most modern and most of the equipment; however, I think you would not state that it was the most modern hotel in the country.

Q. Was it a good hotel? A. Yes, it was a good hotel. However --

* * * * *

69 BY MR. DONNELLY:

Q. What I am getting at, sir, is did this hotel have reasonably modern facilities? A. Yes. This was an alternate hotel selected for the convention. The original hotel which was selected by the international

association was disqualified because this hotel happened to be on strike at that time and the association had to provide an alternate hotel and the King Sheraton was the next best, and so --

Q. Next best in the city? A. I presume it was the next best in the city.

* * * * *

CROSS-EXAMINATION

71 BY MR. GEREL:

Q. As I understand it, Mr. Steele, there were ten members, two officers and the eight delegates, who would have gone -- if you had had enough overall membership would have gone and who wanted to go?
A. That is correct

Q. And so you were faced with a problem because of the international -- not the local but the international rules, of having to show only nine as representing the local? A. That's true.

Q. And so Mr. Greenwell volunteered, although this wasn't required of him? A. No.

Q. He volunteered in order that the others not be offended, isn't that so? A. That is correct.

Q. And this act on his part was an act of generosity insofar as the other members of the board were concerned; isn't that true? A. Well,

72 yes, to that degree. However, --

Q. Yes? A. -- there is nothing in our law that require us to take more than the official number of delegates.

Q. Yes, but I think you indicated his offer established good family relationships within the board? A. I think so. Yes.

Q. And a happy board is a better union than an unhappy board, isn't that true? A. This meant they didn't have to vote against one member to stay home.

Q. It was in the interest of good intra-union harmony to have worked it out this way? A. I think so.

Q. And the committee was eager to accept Mr. Greenwell's offer,

was it not? You were present? A. Not being a member of the committee, I wouldn't know but I would presume, yes, this was a good way of resolving the issue.

Q. Yes. You wanted to send ten but the international wouldn't let you, so you worked out this method? A. Yes. Officially we could not send ten delegates, only nine.

Q. Now, if one of the delegates who was official were incapacitated and could not act so that your union would not then have nine delegates
73 acting but only eight, would it have been proper for Mr. Greenwell to have acted in his place? A. No. Under our law, this cannot be done.

Q. Your meetings referred to him as an alternate. A. That's true.

Q. All right. Were you there? A. Yes.

Q. Did Mr. Greenwell attend meetings? A. Well, I really couldn't say because I was in committee work practically every day that the convention was meeting in general session. But I assume that he did. This is my assumption. I am sure that he did.

Q. Yes. And as a member of the board attending these meetings, discussing with other delegates certain common problems, he would be a better informed member of the board, which he still was? A. Yes, that's true.

Q. And as a better informed member, he could perhaps be more effective in the local than a lesser or a less informed member? A. I should say so, yes.

Q. Isn't this reasonable?

Mr. Steele, did the international or the local make the arrangements for the hotel? A. The international makes the initial arrangements with
74 a hotel and then the local division must make the individual reservations.

Q. I see. Mr. Greenwell testified that the local made his reservations; is that true? A. Yes, that's true.

Q. He also testified that he was paid for each day, including travel time, to and from this convention. A. That's true. He was paid 12 days'

pay of salary September 8 through 19, this was in order to attend, at $30.23 a day.

Q. Was this his regular daily scale of transit? A. This was a regular pay of the executive board members either here or away from home.

Q. I see. It wasn't necessarily his rate with the D. C. Transit? A. No. Had no bearing on D. C. Transit, other than the officers' salaries are adjusted in accordance with the operators' base rate.

Q. Insofar as all of the arrangements, payment, expenses, and so forth, were concerned, is it fair to say that Mr. Greenwell was treated equally with all of the other members? A. Yes. He certainly was.

Q. And I understand that the membership of the union voted upon this arrangement? A. At a regular membership meeting, yes.

75 Q. And they authorized and endorsed this arrangement? A. Yes.

Q. For Mr. Greenwell to attend the convention? A. That is correct.

* * * * *

REDIRECT EXAMINATION

BY MR. DONNELLY:

Q. This banquet on September 14th, was that business or entertainment? A. Well, I think it is entertainment. I think I would classify it as entertainment. It is one of the highlights of the convention. There is always a great todo about the banquet. A nice meal is served, good entertainment following, and dancing afterwards. I think you would classify it as entertainment.

Q. A few drinks served, and so on? A. No, there is no drinks usually served at the banquet. I think it is possible perhaps for the delegates or the guests, and I might say that the convention also includes the guests of the delegates also, and I think it is possible for you also to buy drinks at the hotel level, but none is furnished.

Q. And you previously testified that Mr. Greenwell, as far as you were concerned, was an officer of this union, a guest of the union? A. I

76 think this is the only capacity you could place him as. He could

not go as a delegate and the international constitution and laws doesn't provide for alternate delegates, and it was desirous of taking him along as a member of the official family. So I think this is the only identification that I could say, would be a guest of the division, of the membership.

RECROSS-EXAMINATION

BY MR. GEREL:

Q. I don't have but one or two, Mr. Steele.

You say, if I heard correctly, it was desirous of the official family to take Mr. Greenwell along? A. I think I can safely say.

Q. This is the official family of the association? A. The executive board members and the two top officers.

Q. Yes. Mr. Steele, was the banquet the last order of business? A. No. There was one day of business following the banquet.

Q. Was the banquet on the agenda? A. Yes.

Q. And you had already had a couple of days of business activity? A. Yes. We started Monday, Tuesday, Wednesday, and the banquet was Thursday.

77 Q. So the banquet was a good way to relax from the tension already created and make the man ready, relaxed condition, for the following day? A. I think that is true.

* * * * *

THE DEPUTY COMMISSIONER: Mr. Steele, a few questions ago you referred to wages of compensation that Mr. Greenwell was receiving as an executive board member. You said they had no bearing with the D. C. Transit. Did you mean it had no bearing on his earnings as a shop steward?

THE WITNESS: No, this salary that was paid Mr. Greenwell for this trip to Canada to attend this convention was based on the pay which an executive board member receives if he is on duty here. So we pay the same rate of pay when a delegate goes to a convention.

THE DEPUTY COMMISSIONER: Field trip.

THE WITNESS: That's true. Plus in addition to the amount mentioned on a per diem or daily basis, he received expenses, expenses

allowance of $22 a day for the 12-day period, plus the travel allowance which was rated on the railroad between here and Toronto, Canada, and return.

THE DEPUTY COMMISSIONER: But was any consideration given to any wage loss that he may have had from the D. C. Transit or was that all considered in the compensation that you just enumerated?

78 THE WITNESS: No, we don't take in consideration the wage loss. We pay the rate as provided in our by-laws to the executive board members for any days' work that they are due for in the union.

THE DEPUTY COMMISSIONER: All right. And any wage loss that he may have sustained from the Transit Company as far as you know he has lost?

THE WITNESS: He has lost that, because we provide and make arrangements with the Transit Company to have him relieved from duty with the Transit Company while he is on duty with the union.

THE DEPUTY COMMISSIONER: All right.

BY MR. GEREL:

Q. This last question, I think you say, Mr. Steele, this is the rate paid to board members when they are on duty? A. Yes.

Q. And isn't it true, then, that insofar as the local was concerned, Mr. Greenwell was on duty although insofar as the international is concerned, he was not an official delegate by their by-laws? A. That's true. According to our international law, he was not --

Q. But my entire statement is correct, is it not? A. That's correct, we paid him as if he were on duty.

79 MR. DONNELLY: As if he were on duty.

THE WITNESS: That's right.

(Discussion off the record.)

MR. DONNELLY: I will put it in the form of a question.

FURTHER REDIRECT EXAMINATION

BY MR. DONNELLY:

Q. So there will be no misunderstanding, so we know where we are now, Mr. Greenwell was taken on this trip to Toronto, Canada, simply so he wouldn't miss it; isn't that right? For his own benefit?

MR. GEREL: I object. The evidence is elaborate.

THE DEPUTY COMMISSIONER: Overrule the objection.

THE WITNESS: In order to create good relations.

I think it was previously determined in informal discussions among the officers the past precedent was not a good one for the official family of the union and that at the next convention, that all members of the executive board, including the two top officers, would be taken. It was not designated as to who would be the official delegates. This was to be determined later. And it was determined by Mr. Greenwell himself, who offered to go as the -- and, as he put it there, the alternate delegate.

BY MR. DONNELLY:

Q. This is because, if I understand you correctly, if someone

80 didn't go, he would be very disappointed for not getting the trip?

THE DEPUTY COMMISSIONER: I believe that is in the record.

* * * * *

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CLAIMANT'S EXHIBIT B

D T C

Transit Employees' [Seal]
HEALTH and WELFARE PLAN
900 F Street, N.W. Washington 4, D.C.

* * * * * * * * *

December 27, 1962

Clarence L. Greenwell
521 N. Bouldin Street
Baltimore 5, Maryland

Dear Mr. Greenwell:

The Trustees of the Health and Welfare Plan have received a copy of notice of hearing in your application for occupational disability benefits under the District of Columbia Workmen's Compensation.

The records of this office indicate that you applied for and were paid non-occupational disability benefits in the amount of $20.00 per week for 13 weeks.

In the event of your recovery on the basis of occupational disability covering the same injury and for the same period of time you will, of course, refund to the Health and Welfare Fund the $260.00.

The records of this office also indicate that under the Health and Welfare Plan, reimbursement to you and payments on your behalf and services to you to the total value of approximately $480.00 were made by Group Health Association, Inc. Your attention is directed to the provisions of the contract between the Health and Welfare Plan and Group Health Association, Inc. (see page 12 of the Member's Handbook) under which Group Health Association, Inc. is not required to provide the following services: "Treatment or hospitalization of industrial accident cases or other cases if such services are provided under Federal or State employees' compensation laws, or under other laws or government regulations, to the extent of such provisions;".

In the event of your recovery on the basis of occupational disability covering the same injury and for the same period of time you will, of course, refund to Group Health Association, Inc. to the extent that you received such compensation.

Very truly yours,

/s/ Leon D. Richeson
Administrative Assistant

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RESPONDENTS' EXHIBIT NO. 1

APPLICATION FOR BENEFITS
from the
TRANSIT EMPLOYEES' HEALTH AND WELFARE PLAN

NAME GREENWELL (Last) CLARENCE (First) LODIS (Middle)

EMPLOYEE NO. 352898 DATE OF BIRTH: 3-29-1902

DEPT. or DIVISION Western LAST DATE WORKED 12-4-1961

TYPE OF BENEFITS APPLIED FOR:
Weekly Disability Benefits. Weekly payments for non-occupational disability benefits will begin after 30 days of disability or exhaustion of paid sick leave – whichever occurs later.

I certify that this illness or injury is not the result of:

1. Service in the Armed Forces of the United States or any other nation.
2. Performance of duties for another employer while on authorized leave.
3. Use of intoxicants, narcotics or misconduct.

By reason of this application, authority is hereby given that Health and Welfare and Union Dues be deducted from weekly disability benefit checks when required.

SIGNATURE: /s/ C. L. Greenwell

ADDRESS: 4407 Furnkell Rd.
Silver Spring, Md.

TELEPHONE WH 68638 DATE 12-27-1961

Emma Florence Hamstead
(Witness if signature is by mark)

[Filed Jan. 3, 1964]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY & MOTOR COACH EMPLOYEES OF AMERICA, Plaintiff,	)	
vs.	)	Civil Action No. 824-63
HERMAN ADLER, Deputy Commissioner, Defendant.	)	

NOTICE OF APPEAL

Notice is hereby given this 2nd day of January, 1964, that the plaintiffs, Amalgamated Association of Street, Electric Railway & Motor Coach Employees of America and St. Paul Fire and Marine Insurance Company hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 26th day of December, 1963 in favor of the Deputy Commissioner Herman Adler, the defendant, against said plaintiffs.

/s/ William J. Donnelly, Jr.
Attorney for Plaintiffs

[Certificate of Service]

BRIEF FOR APPELLANTS

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,427

AMALGAMATED ASSOCIATION OF STREET ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA,

ST. PAUL FIRE AND MARINE INSURANCE CO.,

Appellants,

vs.

HERMAN ADLER,

Appellee.

APPEAL FROM THE U. S. DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

RICHARD W. GALIHER,
WILLIAM E. STEWART, JR.,
WILLIAM J. DONNELLY, JR.,
1215 - 19th Street, N.W.,
Washington, D. C.

Attorneys for Appellants.

QUESTIONS PRESENTED

1. Assuming arguendo that a local District of Columbia union representative while attending a convention of the international or parent union in Toronto, Canada is an employee within the meaning of the District of Columbia Workmen's Compensation Act, does an accidental injury sustained by such employee after convention business hours, which occurs as the result of the employee slipping in a bath tub in his hotel room while bathing his feet and showering preparatory to dressing for a banquet later on that evening, arise out of and in the course of his employment? Or alternatively stated, is an injury arising out of an act of personal hygiene while on a business trip for an employer an incident of employment?

2. Is a shop steward and executive board member of a labor union whose regular employment is that of a bus driver with the D. C. Transit System, Inc., who "volunteers" to go to Toronto, Canada as an "alternate delegate" to attend a convention of the International Union of which his local is a member, with all expenses paid, plus pay, where the international rules of the union provide that there is no such thing as an "alternate delegate" and where it is undisputed that while attending the convention as an "alternate delegate" he performed no duties or had no responsibilities whatsoever for the union and could not have performed any duties or assumed any responsibility for the union in case of incapacity of one of the nine legally designated delegates from his local union attending the convention, an employee of the union within the meaning of the District of Columbia Workmen's Compensation Act?

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TABLE OF AUTHORITIES CITED

STATUTES

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,427

AMALGAMATED ASSOCIATION OF STREET ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA,

ST. PAUL FIRE AND MARINE INSURANCE CO.,

Appellants,

vs.

HERMAN ADLER,

Appellee.

APPEAL FROM THE U. S. DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANTS

JURISDICTIONAL STATEMENT

This is a suit to vacate an order of the Appellee, a Deputy Commissioner of the Bureau of Employees Compensation, U.S. Department of Labor, who awarded certain workmen's compensation benefits, pursuant to the Longshoremen and Harbor Workers' Act, Title 33, U.S.C.,

Section 901 et seq., as made applicable to the District of Columbia by Title 36, D.C. Code, Section 501 (1961 Ed.). Jurisdiction is invoked under Title 28, U.S.C., Section 2901 and Title 33, U.S.C., Section 921(b).

STATEMENT OF THE CASE

Clarence Greenwell, hereinafter called the claimant, was a full-time bus driver and employed with the D.C. Transit System, Inc., Washington, D.C. He was also associated with Amalgamated Association of Street Electric Railway and Motor Car Employees of America (Local 689), hereinafter called the union, as a shop steward. In addition to his duties as a shop steward, he was also elected by the union membership to the executive board of the union.

In September of 1961, he along with nine other members of the executive board of the local union attended a bi-annual convention of the International union in Toronto, Canada. While in Toronto, on September 14, 1961, he fell in a bath tub in his hotel room while preparing himself for an evening banquet and sustained a back injury. Thereafter he filed a claim for disability benefits under the District of Columbia Workmen's Compensation Act against the union and its workmen's compensation carrier, the St. Paul Fire and Marine Insurance Company, hereinafter called the carrier.

His claim was controverted on the grounds that he was not an employee at the time and place of the injury within the meaning of the District of Columbia Workmen's Compensation Act and further that if he was found to be an employee then the accidental injury complained of did not arise out of and in the course of his employment. (JA 14, 15).

The case came to a hearing before the appellee, Deputy Commissioner Herman Adler. The issues to be considered were whether or not the claimant was an employee within the terms of the Workmen's Compensation Act of the District of Columbia and secondly, and if he

did have such status did the accident arise out of and in the course of his employment. (JA 14, 15). It was stipulated that the claimant had a 20% permanent partial disability to his back and that an accident occurred at the time and place alleged.

The first witness who testified was the claimant. (JA 17). He testifed that he had been a shop steward and a member of the executive board of the union since 1950. He was employed with the D.C. Transit System as a bus driver. He had been with the Company for 26 years, and this was his regular employment; that as a shop steward and board member of the union (JA 17) he received a salary of $84 a month from the union (JA 18); that the union made deductions from his salary such as withholding tax and social security; that he had attended bi-annual conventions of the union since 1950; that in September of 1961 a convention was held in Toronto, Canada at the King Edward Hotel (JA 19); that the International Union, of which his union, division 689, was a local, made the arrangements for the convention; that while attending the convention, members of the executive board received a daily rate of pay plus an expense allowance, which included travel and lodging (JA 19, 20).

He stated that the accident occurred on September 14, 1961 between 4:00 and 4:30 p.m.; that those at the convention attended a banquet that evening; that he took a bath after working hours between 4:00 and 4:30 p.m.; that he was seated on the tub washing his feet and legs from the knees down; that he had the shower running and when he got up he slipped and fell (JA 21); that the bath tub was an old type, that is, it was constructed with four legs (JA 22); that the tub sloped down and did not go exactly straight on the side and the bottom of it was not flat (JA 23); that the tub he had at home was one of the newer ones, that is a flat type; that he was taking a bath for the purpose of cleaning himself up in preparation of the banquet which he attended that evening (JA 21).

He testified that the banquet is a usual function of the convention; that it has the usual good food, drink and entertainment and in addition, some speakers; that the main speaker was Senator Wayne Morse; that the speeches are of special interest to the members of the association (JA 22).

On cross examination he testified that as a shop steward he was elected to that position by other bus driver members of the union, and as such he represented the members of the union in connection with their problems with the Transit Company; that he is not a paid member of the union staff (JA 24-26); that his job as shop steward was the usual union shop steward position (JA 25); that he like others on the executive board looked forward to the trip to Canada (JA 25); that because he was away in connection with representation to the union he did not get paid by his employer, D.C. Transit and that the union pay he received was to re-imburse him for his loss of income while he was away from the Transit Company (JA 26); that in 1959 he had attended the convention and since the executive board of a local union had 10 board members one man had to stay behind on that occasion, since the international rules permitted only nine members or delegates to attend the convention; that in 1961 only nine members were supposed to attend in accordance with the international rules, but 10 went (JA 26); that he went along as an alternate delegate to the convention; that as an alternate he performed no functions and had no duties; that he did not vote, had no official capacity (JA 27) that he stayed at the King Edward Hotel in Toronto (JA 27) which Hotel had been reserved for him by Mr. Steel, the secretary of the union (JA 27); that the King Edward is a member of the Sheraton chain and is a modern hotel and is 17 or 18 stories high (JA 27); that the banquet was set for 8:30 or 9:00 p.m. When asked if the banquet was strictly entertainment, he replied that despite the fact that there were speakers at the banquet, the banquet did come within the classification of entertainment as far as the union members were concerned.

He acknowledged that the only difference between the bath tub in which the accident occurred and the one in his home was that the one in his home is one of the modern-day bath tubs that was put out in the last 15 years or so (JA 28); that he was 61 years of age and had plenty of experience using the "old time" bath tubs that have legs on them and that this was the type of bath tub in the King Edward Hotel; that he was not required to be at the banquet; that he admitted that he liked to bathe or shower once a day; that it is usual for him to take a daily bath or shower after working hours (JA 29); that the King Edward Hotel was an air-conditioned hotel and that he had been in the Hotel most of the day in question; that the convention activities stopped at about 4:00 o'clock or there about; that everyone had quit their various activities by the time he was taking his ill fated shower; that he admitted applying to the D. C. Transit Company's Employees Transit Welfare fund for certain benefits (JA 29, 30); and in an application for benefits (JA 30, respondent's exhibit #1) he certified to D. C. Transit that he had sustained a non-occupational disability and was not in the performance of duties for another employer when the injury occurred; that he applied for such benefits because he did not know that his union even had workmen's compensation.

On recross examination he stated that he went as an alternate because the membership voted for it and authorized it. He admitted that he had volunteered to go as an alternate. (JA 32).

Upon being questioned by appellee he described the rim of the bath tub as being about two feet off the floor and that he was sitting on the rim (JA 33), because he always washes his feet first, then he stands up to take a shower; that when he slipped he could not say it was due to the soap or the shape of the tub, all he knew was that he slipped and fell (JA 33); that he took a shower that evening and dressed up in order to look good and make an impression on the other delegates (JA 34);

that as a board member it is necessary to run for that position and be elected by the membership by a majority of votes and he was elected as a shop steward by the western division of employees of D. C. Transit System; that there are shop stewards for each garage or barn (JA 35).

On further questioning claimant admitted that he did have soap on his feet when he stood up and the water was running; that he was washing his feet just before he got up and soaked them (JA 36).

Henry G. Steel, Financial Secretary-Treasurer, and assistant business agent for local division 689 of the union, testified that he was a bus operator with the Transit Company, who was on a leave of absence from the Transit Company while serving as a full-time officer in local division 689 (JA 36, 37); that the international convention convenes every two years and represents all the local divisions in the United States and Canada; that local 689 was allowed by the international rules to have nine delegates attend the convention (JA 31, 38); that the local union had 10 members on the executive board and accordingly, one had to be eliminated as a delegate; that this convention is something that the locals look forward to and that all of the delegates look forward to the trip, which is always in a distant city (JA 38); that the convention affords relaxation, pleasure and entertainment, particularly for those who are not designated to serve on committees; that ten men from local 689 went to the convention; that the tenth man had no duties or official capacity whatsoever (JA 38-39); that the reason for sending this extra man was to keep good relations and feelings within the official family of the executive board; that an excerpt from the executive board meeting of local 689 of August 15, 1961 stated as follows:

> "Selection of international delegates: several methods were discussed as to how the delegates to the international convention would be selected. But before the members of the board could come to an agreed plan of selection, executive board member, Clarence Greenwell, offered to be an alternate to the convention, so with this declaration a discussion as to the method of selection was cut off and Brother Greenwell's offer was accepted." (JA 39)

Mr. Steel further testified that under the constitution and the by-laws there was no such thing as an alternate delegate; that the claimant while at the convention had no duties outlined for him; that it was not necessary for him to attend the convention; that his attendance at the convention was merely a courtesy to him (JA 39, 40); that the members of the executive board considered him to be "a guest of the local division"; that the King Edward Hotel was considered to be the next best Hotel in the City of Toronto and had reasonably modern facilities.

On cross examination Mr. Steel testified that Greenwell's offer to go as an alternate to Toronto kept the executive board happy since, officially, the local could not send 10 delegates; that if one of the delegates officially present became incapacitated the claimant could not have acted in his place because this could not be done under the union rules; that as a member of the board attending the convention, he would be a better informed member of the board (JA 41, 42); that the membership of the union voted upon this arrangement to send the claimant to Toronto at a regular membership meeting; that the membership endorsed this arrangement for the claimant to attend the convention.

On redirect examination, Mr. Steel stated that the banquet was classified as entertainment and was one of the highlights of the convention; that a nice meal was served, good entertainment followed, and there was dancing afterward; that he reiterated that the claimant

was a guest of the union because he could not go as a delegate and the international constitution and bylaws of the union did not provide for alternative delegates; that it was simply a desire of the executive board to take the claimant along as a guest of the executive board and the membership of local 689 (JA 43, 44); that if one of the members of the executive board could not attend the convention it would have been a disappointment to that man to have missed the trip.

After hearing the case, Appellee on March 1, 1963 issued an order wherein he found, as a matter of fact and law, that the claimant was an employee of the union at the time and place of the accident, further that the injuries sustained by claimant arose out of and in the course of his employment, and accordingly was entitled to accrued temporary total disability benefits of $1,690; accrued permanent partial disability benefits in the amount of $1,265 or a total of $2,950, for the reasonable cost of all medical treatment and care received by the claimant and for future compensation benefits payable at the rate of $27.50 per week, payable in bi-weekly installments (JA 5-10).

Within the time provided before the award would become final in accordance with Title 33, U.S.C., Section 921(a) appellants filed a complaint in the court below (JA 1-2) to vacate the award on the grounds that the deputy commissioner erred as a matter of law when he ruled that the claimant was an employee within the meaning of the Compensation Act and further that the injury did not as a matter of law arise out of and in the course of the claimant's employment. The appellee filed an answer denying appellants' allegations (JA 3) Thereafter appellee and appellants filed motions for summary judgment (JA 3,4).

The motions for summary judgment came on for a hearing before the Honorable Joseph A. McGarraghy and the court after reviewing the record, the respective motions with supporting points and authorities

and hearing oral argument by counsel for the respective parties, denied the appellants' motion for summary judgment and granted appellee's motion for summary judgment (JA 4, 5). Thereafter, appellants filed a timely notice of appeal (JA 49).

SUMMARY OF ARGUMENT

1. Injuries sustained by an employee arising out of an act of personal comfort or convenience are not incidental to employment, because such an injury does not arise out of any hazard created by employment. Bathing and showering and the making of toilet are not part of travelling and employment, but of living. The accident here occurred while the claimant was performing a personal act and was completely unrelated to employment. An act of bathing in a bath tub should not be held to be contemplated by an employer as an incident to an errand or travel and therefore an injury arising out of such an event would not be in the course of employment. To hold otherwise would be to extend the Workmen's Compensation Law beyond its purpose and intent.

2. The claimant, Greenwell, was not an employee within the meaning of the Compensation Act, while attending the convention in Toronto, Canada. He performed no duties for the union while on the trip and he had no responsibilities to the employer. He volunteered to go to Canada as an alternate delegate with all of his expenses paid, plus a salary, because only nine delegates of the executive board of which he was a member could attend and there were 10 men on the executive board and all wanted to go to Canada. The International Rules did not recognize a so-called alternate delegate, therefore, even if one of the officially designated delegates became incapacitated, the claimant could not act in his stead. The claimant's status, then, was not that of an employee while in Canada.

ARGUMENT

I. Assuming That Claimant Was an Employee Within the Meaning of the Act, the Injury Did Not Arise Out of and in the Course of His Employment, Therefore, His Claim Was Not Compensable.

The issue presented here is whether or not an injury suffered in the performance of an act of personal comfort arises out of and in the course of employment. The facts are not in dispute. The record shows that the claimant volunteered to go to Toronto, Canada, to attend a bi-annual convention of the international union of which his local was a member and that he had been attending these conventions since 1950. The delegates selected to attend were picked from the executive board of which there were ten members. Under the international rules of the union, only nine delegates could attend. All ten members of the board looked forward to the convention and to the opportunity of taking a trip to Canada. One member, however, would have to remain behind and thus miss the all-expense paid trip, which would undoubtedly be a most pleasant one, particularly at this time of the year. The claimant Greenwell and his union brothers skirted the union's international rules, which only permitted nine delegates to attend by having Brother Greenwell volunteer as an "alternate" delegate. As an "alternate" he had no duties or responsibilities and could not even step in to replace an official delegate if one became incapacitated.

He attended the convention and after completion of the convention business hours on the third day, he went to his hotel room, which was located on the 17th floor of a modern Sheraton Chain Hotel to dress and bathe in preparation for a banquet that evening which was to start at about 8:30 or 9:00 p.m. It was his habit to take a daily bath or shower. The tub in question was an ordinary four legged one commonly found in pre-war hotels. He sat on the rim of the tub with the shower running

and following his usual practice, he soaped his feet first. He then stood up, but unfortunately slipped and fell and injured his back.

If the claimant, while in the process of getting dressed for the banquet severely cut himself shaving, while using a straight razor or ruptured a disc in his low back as the result of suddenly bending over to pick up a comb he had dropped while combing his hair, clearly such injury would not be covered under workmen's compensation because they obviously would not arise out of his employment. It is true that such injuries may well be covered under an accident and health policy, but the Workmen's Compensation Act of the District of Columbia is not the equivalent of an accident and health policy. The accidental injury suffered here is no different than that of an injury suffered while shaving. Both arise out of personal comfort and convenience and have no relation whatsoever to employment. The personal act of taking a bath or shower or in shaving is not incidental to employment and is not contemplated by an employer as an incident or a risk of employment.

An employer should not be an insurer of his employee for all injuries sustained by an employee on a business trip for the employer. To extend an employer's liability for workmen's compensation to a case such as this would in fact make an employer a guarantor or insurer of his employee's safety for every minute of the time that he is away and the employer's workmen's compensation insurance policy an accident and health policy.

In Hurley vs. Lowe, 168 Fed. 2d 553, 83 U.S. App. D.C. 123, this Court had a case before it with a factual situation quite different from the case at bar, but the legal issue was similar in some respects. In Hurley, a member of the Bar of the District of Columbia was employed with a salary by a law firm. By direction and on behalf of his employer, the attorney went to New York and thence to Boston on firm business. On the evening of his day in Boston he was having dinner with his

parents at a restaurant and while in the restaurant slipped down some steps and sustained an injury. The Deputy Commissioner rejected his claim and the finding was affirmed. This Court stated at page 125 of 83 U.S. App. D.C.:

> "**the course of employment on a specified errand, ordered by an employer, to a place different from the regular place of employment, includes all the ordinary incidents of the errand which the employer would normally contemplate as occurring in the course of it.**"

The Court, however, further stated on page 125:

> "We do not mean to imply that anything that an employee might do while on an errand would be in the course of his employment. Any activity which would not normally be contemplated by the employer as an incident to the errand would not be in the course of employment.***"

These statements from the opinion in the Hurley case are applicable to the case at bar, because bathing would not be contemplated by an employer as an incident to the errand.

In Hurley, the U.S. Department of Labor filed a brief on behalf of the Deputy Commissioner and cited and relied therein upon the cases of Johnson vs. Smith, 263 N.Y. 10, 180 N.E. 140, Wynn vs. Southern Surety Company, 26 S.W. 2d 691 (Tex. Civ. App.), and Pillsbury vs. Liberty Mutual Insurance Co., 143 Fed.2d 807 (9th Cir.).

In Johnson, the New York Court of Appeals held that an employee out of town on a business trip did not sustain a compensable injury as the result of contracting Typhoid Fever from a cook where he ate lunch on his lunch hour, because:

> "During that time he quit work and his course of employment temporarily ceased."

In Wynn, the employee was on a business trip with salary and expenses and an automobile furnished to him, to service his territory. At 6:30 in the evening on a Sunday, he went into a restaurant to have dinner, then on the way back to his hotel he was hit by an automobile. There was evidence in the record that he had visited a customer on Sunday. The Court in rejecting his claim for compensation held:

> "a travelling salesman while eating his meals or sleeping at hotels, or attending church or theaters, or going to picnics or private errands for his own pleasure or profit is not within the contemplation of the Workmen's Compensation Act, engaged in his employer's business and an injury received by him while performing said act or engaged in said recreation is not, within the purview of said law an injury received in the course of his employment."

In Pillsbury, the employee had contracted to work in Hawaii at a defense base for his employer. While awaiting a ship in Oakland, California to depart for Hawaii, during the period of his contract of employment, he had dinner with a friend and then in order to kill time he took a stroll along the water front. On returning to his hotel he was hit by a car. The Deputy Commissioner awarded compensation. The District Court set the award aside and the Court of Appeals affirmed and at page 809 of the opinion stated:

> "In a remote sense the recreation of the stroll in the Oakland Park and on the water front and the entertainment of the cinema may make a more efficient laborer. So also he might work better the next day because of a dose of bicarbonate of soda after his dinner. The Act has yet to be interpreted as making an employer an insurer for the employee accidentally swallowing strychnine or for the collapse of the theater. No more did it insure Keil against accidents during his Sunday stroll after dinner to no particular place in Oakland for the purpose of killing time."

Decisions under the New York Workmen's Compensation Statute are more than just persuasive since our local law is derived from the New York Act. Hartford vs. Hoage, 66 App. D.C. 154, 85 Fed 2d 411. New York has consistently taken the view that accidental injuries arising out of circumstances such as we have here are not compensable under the Compensation Act.

In Davidson vs. Pansy Waist Co., 240 N.Y. 534, 148 N.E. 715, the claimant, a travelling salesman on a business trip engaged a room in a hotel in Detroit, Michigan. During the day, he used his room to display his line of merchandise. On the day of the accident he arose in the morning, fixed his samples to get ready for the day and then went into the bathroom to take a bath. He slipped in the bathroom, grabbed the lever in the shower, fell, and was scalded by hot water. The State Industrial Board ruled that the accident arose out of and in the course of his employment and awarded him compensation. On appeal, the case was reversed, per curiam. The ruling of the court was:

> "While it may be that at the time the claimant sustained his injuries he was making himself ready to perform his regular daily work as a salesman, such preparation cannot be said to be a part of his employment, and it does not appear that he might not have prepared himself in exactly the same way if engaged in any other employment or vocation. The injury did not arise out of and in the course of his employment."

In Seaman vs. Hewlett Fire Department and the State Ins. Fund, 183 N.Y. Sup. 2d 408, we find a decision on all fours with the factual situation here. The claimant, a volunteer fireman attended a fireman's convention as a delegate. He stayed at a motel and was injured while taking a shower sometime prior to a morning session of the convention. He filed a claim for workmen's compensation benefits and the claim was disallowed because he was engaged in a purely personal act

at the time of his accident. The Court of Appeals in a memorandum decision affirmed the finding as a matter of law because he was injured while in the performance of an act personal to himself.

In Hall vs. City of New York, 15 N.Y. Sup. 2d 672, the claimant was employed as a nurse in a city hospital. She lived in the hospital and while taking a bath slipped in the bath tub and fell, sustaining injuries for which the Workmen's Compensation Board awarded her compensation. On appeal the decision of the Board was reversed by the Court of Appeals upon the authority of Davidson, supra.

In Schultz vs. National Associates, Inc., 281 App. Div. 950, 119 N.Y. Sup. 2d 673, a female employee while seated at her desk, started to comb her hair for the purpose of preparing herself to go to lunch. She stuck the comb in her eye and sustained an injury. She submitted a claim for Workmen's Compensation and the board awarded it to her on the ground that the injury arose out of and in the course of her employment. On appeal the case was reversed. The court ruled:

> "**she was performing a purely personal act entirely unrelated to her employment, and the injury was not caused by anything connected with her employment or by reason of her presence on the employer's premises. Where the injury arises from the personal carelessness or negligence of the claimant in the performance of a personal act, wholly disassociated from the employment and where the danger or risk involved was in no way connected with the place of employment or claimant's presence there, the injury did not arise out of employment within the intent and purpose of the workmen's compensation law."

Another pertinent New York decision is the recent case of Davis vs. News Week Magazine, 305 N.Y. 20, 110 N.E. 2d 406. The majority in a four to three decision held that the activity of swimming in the ocean while on a combined business and pleasure trip was purely

personal and a recreational pursuit and therefore not compensable under the compensation act. The court in reaching its decision stated:

> "**the risk of travel may be compensable even though it is travel to a place of rest or refreshment, so long as travel is a part of the work routine. But an accident happening at such place, resulting solely from the personel pursuits therein undertaken is not compensable (citing cases). Neither is an injury resulting from a recreational activity compensable, where such activity is carried on the employee's own time and off the employer's premises, though the employer has sanctioned and given financial assistance to such activity."

Cases worthy of consideration from other jurisdictions are Gibbs Steel Company vs. Industrial Commission, 243 Wisc. 375, 10 N.W. 2d 130, Hayes vs. Alabama Bi-Products Corp., 5 So. 2d 624 (Ala.) and Breland vs. Whitten, 139 So. 2d 365 (Miss.).

In Gibbs, the claimant, a travelling salesman, was injured while travelling in the State of Wisconsin. All of his expenses, including lodging, automobile and food were paid by his employer while staying at a tourist camp for overnight lodging, which was convenient for him to get an early start for a business trip the following morning. While in his room he stepped from the shower and slipped on a small rug and fractured his leg. The commission found that the injury arose out of and in the course of his employment. On appeal, the Court of Appeals reversed, stating:

> "We are of the opinion that applicant, while occupying his room at the camp was not in the course of his employment and that in any event, the injury did not arise out of any hazard created by his employment. The applicant had a complete and unrestricted choice of sleeping facilities. Sleeping and making of toilet are not part of travelling, but of living."

In Hayes the claimant was a mine worker. His work day ended at 5:00 a.m., the mine did not provide bathing facilities for its employees and had no requirements that they bathe and made no effort to regulate the time and place that they bathed. On the day of the accident, the claimant left his job and walked to a shower house behind a boarding house to take a bath. The shower house and boarding house were on Company property but were leased by the mining company to an individual. While in the shower room, a hot water tank exploded and scalded him. The trial court found that the accident which caused his death did not arise out of and in the course of his employment. On appeal the judgment was affirmed on the ground that when the accident occurred the deceased was performing a personal act not related to his employment or to an incident of his employment and therefore ruled the claim was not one arising out of and in the course of his employment.

In Breland, a recent decision decided April 2, 1962, the factual situation was quite similar to the case at bar. There a lawyer employed with a firm covered under the workmen's compensation law, went to another city to investigate the facts of a pending case. It was necessary for him to stay in this city for three or four days and he registered at one of the principal hotels for lodging. He had an appointment for Monday morning, August 1, 1960 in connection with his duties. At about 7:30 a.m. on that morning, while taking a shower-bath, hot water struck his body and in an effort to get away, he fell in the tub and was injured. He submitted a claim for workmen's compensation and it was allowed. The Court of Appeals reversed the decision of the compensation commission and in a well reasoned opinion said:

> "This court is of the opinion it would be a strained construction to hold a lawyer injured outside working hours and while engaged in such a personal act as bathing, to say his injuries arose out of and in the course of his employment. We therefore reverse this case and dismiss the claim."

It is significant to note that the court in Breland stated that research by the court did not disclose one reported decision which held that a fall sustained in a bath tub while on a business trip or errand was held to be compensable under a workmen's compensation act. Likewise, appellants have not found a single decision standing for the proposition that bathing in a bath tub even if the employee is on a special errand for his employer is an incident of employment. The courts are in unanimous agreement in holding that an injury arising out of a personal act such as this is not incidental to employment except where bathing and cleaning up is a necessity of a particular job; for example, see Sexton vs. Public Service Comm. of City of N. Y., 167 N.Y.S. 493, 180 App. Div. 111, and Miller vs. F.A. Bartlett Tree Expert Co., 3 N.Y. 2d 654, 148 N.E. 2d 296. But if the employee might have prepared himself in the same way, as in this case, if engaged in any other employment, an injury occurring during such preparation is not compensable. Davidson, Hall, supra.

The accident to the claimant occurred while he was on his own time and while in the act of performing something personal to himself. The fact that such an accident occurs on a business trip or special errand does not make it an incident of employment. Whether or not an accident arises out of and in the course of employment is a question of law for a court to determine, Hot Shoppes vs. Shreve, 110 U.S. App. D.C. 268, 292 Fed. 2d 761. The facts here raise a clear cut question of law and to decide them in the way that the appellee did here is contrary to law and accordingly this Honorable Court should reverse the ruling of the court below and set aside appellee's erroneous award.

II. The Appellee and Court Below Erred in Ruling That Claimant Was an Employee at the Time and Place He Sustained Injury

The fact is undisputed that the claimant went on the trip to Canada as a guest of the union. He had no duties to perform and did not perform any. He had no responsibilities and he assumed none. He could not take a part in the convention activities and he took none. He had no right under the union Rules to attend as a delegate or otherwise. He attended as a volunteer and was extended the courtesy and privilege by his union of making a trip to Canada because of the obvious pleasure the trip would afford to him. He was not required to go to Toronto and while there he was not required to attend the convention banquet. In fact, he was neither asked nor required to go. The fact remains that one of the members of the executive board would have to remain in Washington and thus miss the trip. One member therefore if all were to go would necessarily have to ask and request the union to let him go. This the claimant did. Under the circumstances it is difficult to comprehend why he was considered by the Deputy Commissioner to be an employee within the meaning of the Compensation Act. The uncontroverted evidence shows clearly that claimant was not on duty, that he was not ordered to go to Toronto and was there solely as a guest on his own volition.

The question posed by the evidence is why or for what purpose did he make the trip to Canada. The answer is plainly that he went for his own enjoyment and purpose with all expenses paid for by his union. Appellants therefore submit that claimant should not enjoy the status as an employee under the peculiar facts of this case, within the meaning of the Compensation Act. His status was similar to the claimant in the case of Roper vs. American Mutual Liability Insurance Co., 69 Ga. 726, 26 S.E. 2d 488. In Roper the decedent was an electrical salesman who was killed in an automobile accident on his way home from a

convention, to which he was invited but not compelled to attend. When he attended the convention he acquainted himself with various electrical appliances on display and acquired knowledge which would be of assistance to him in the performance of his duties for his employer. His attendance at the convention would also have given him a better entre into the business world for a potential customer. The Court of Appeals held that under the circumstances of that case, which are quite similar to the facts here, the claimant was not an employee within the meaning of the compensation act and therefore ruled that his accidental death did not arise out of and in the course of his employment.

In Pilkington vs. State Highway Department, 10 A. 2d 489, 124 NJL 11, the claimant was a right of way Negotiator for the Highway Department in the State of New Jersey. On the day of the accident, he was in a private automobile, which was owned and operated by one of the inspectors of the Highway Department. The other passengers in the car were also connected with the Highway Department. The claimant and others had attended a dinner given by a "Ten Year Club." There was evidence that business was discussed at the dinner. An accident occurred on the way back from the dinner. The Workmen's Compensation Commission allowed compensation, the lower court reversed and the case went on appeal, and the decision of the lower court reversing the compensation commission was affirmed. The court of appeals said that the issue really was whether or not the purpose of the claimant going to dinner was to discuss a matter of employment and that the attendance at the dinner was incidental thereto, or the major purpose of the journey was to attend the dinner and incidentally to discuss a business matter with his superior. The court of appeals in affirming the lower court held that the injury did not arise out of and in the course of employment and then quoting from an authoritative New York decision said:

"We do not say that service to the employer must be the sole cause of the journey, but at least it must be the concurrent cause. To establish liability the inference must be permissible that the trip would have been made though the private errand had been cancelled.** The test in brief is this: If the work of the employee creates the necessity for travel, he is in the course of his employment, though he is serving at the same time some purpose of his own. (citing case) If, however, the employment has no part in creating the necessity for travel, if the journey would have gone forward though the business errand had been dropped, and would have been cancelled upon failure of the private purpose, though the business errand was undone, the travel is then personal and personal the risk."

Applying the foregoing test, the court said that the claimant was attending the dinner in consequence of his own purpose to attend the social affair and therefore when the accident occurred it did not arise out of and in the course of his employment.

The reasoning of the court in Pilkington applies here. The evidence shows that the major purpose, that is, the underlying reason for the claimant attending the convention in Toronto, was to make a trip for his own purpose. This is borne out by the record, the admissions of the claimant, the testimony of Mr. Steel, the secretary of the union, and the fact that claimant was clearly there without duties or responsibilities to the union. The record demonstrates that the Deputy Commissioner and the court below were in error in holding that the claimant was an employee within the Act.

CONCLUSION

Appellee acted contrary to law when he granted an award of medical and workmen's compensation benefits to the claimant and against Appellants in this case, and the record so shows. The court below was therefore in error when it denied the Appellants' motion for summary judgment and granted Appellee's motion for summary judgment. The ruling of the court below should be reversed and the award of the Deputy Commissioner set aside.

Respectfully submitted,

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BRIEF FOR THE DEPUTY COMMISSIONER

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

No. 18,427

AMALGAMATED ASSOCIATION OF STREET ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA, and ST. PAUL FIRE AND MARINE INSURANCE CO.,

Appellants,

v.

HERMAN ADLER, DEPUTY COMMISSIONER, BUREAU OF EMPLOYEES' COMPENSATION, UNITED STATES DEPARTMENT OF LABOR,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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QUESTION PRESENTED

Whether the Deputy Commissioner's conclusion, that the injury sustained by the claimant arose out of and in the course of his employment, is supported by evidence and not inconsistent with law.

I N D E X

CITATIONS

Cases:

Cases continued

Cases continued

UNITED STATES COURT OF APPEALS FOR
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FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE DEPUTY COMMISSIONER

COUNTERSTATEMENT OF THE CASE

This action was instituted by the appellants to set aside a compensation order and award made by the Deputy Commissioner pursuant to the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901, made applicable to the District of Columbia by 36 D.C. Code 501 (J.A. 1-3). The district court, by an order filed on December 26, 1963, granted the Deputy Commissioner's motion for summary judgment and dismissed the action (J.A. 4-5).

The basic facts underlying the claimant's injuries are as follows: The claimant, Clarence L. Greenwell, a bus driver for the D. C. Transit Company, was also employed by the appellant, Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, Division 689, as a shop steward and member of the local union's executive board (J.A. 12, 16-18). The appellant local union was affiliated with the International Amalgamated Association of Street Electric Railway and Motor Coach Employees of America, AFL-CIO (J.A. 5). In August, 1961, at a meeting of the executive board of the appellant local union, the claimant was selected to attend as an alternate delegate the convention of the parent international union the following month in Toronto, Canada (J.A. 5, 26, 39, 42). While attending this convention, and while taking a bath in preparation for the convention banquet, the claimant on September 14, 1961, injured himself by slipping in the bathtub in his room at the hotel in Toronto where the convention was being held (J.A. 6-7, 12, 21-22).

The claimant received a salary, plus the cost of transportation and a daily expense allowance, from the union in connection with attending the convention (J.A. 7, 19-20, 23). As an alternate delegate to the convention, the claimant did not have any delegated duties or voting rights, but, in case of incapacity of one of the regular delegates, he would have the duties and voting rights of

a regular delegate (J.A. 6-7, 26-27, 31). However, the claimant, as an officer of the union, was expected to attend the convention (J.A. 18). In addition, he attended all convention meetings and took part in discussions so that he could vote if the occasion arose and so that he would be a more informed and effective officer of the appellant local (J.A. 7, 31, 42).

At the hearing before the Deputy Commissioner, the appellants acknowledged that the claimant's status as an employee of the appellant union could not be denied (J.A. 16). However, the appellants took the position that in this particular instance, while attending the convention in Toronto, the appellant was not acting as an employee in the course of his employment and that the accident did not arise out of and in the course of his employment (J.A. 14, 16). After the hearing, the Deputy Commissioner rejected the appellants' contentions and found that the injury did arise out of and in the course of the claimant's employment with the appellant union (J.A. 7-8). Consequently, the Deputy Commissioner awarded compensation for the temporary total disability and permanent partial disability resulting from the injury (J.A. 8-10). The only ground asserted by the appellants in the district court for setting aside the award was that the Deputy Commissioner's finding that the injury arose out of and in the course of employment was unsupported by the evidence and legally erroneous (J.A. 2).

STATUTES INVOLVED

The Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, as amended, 33 U.S.C. 901, et seq., provides in part:

33 U.S.C. 921(b):

> If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings, mandatory or otherwise, brought by any party in interest against the deputy commissioner making the order * * *.

36 D.C. Code, 501, 45 Stat. 600, provides:

> The provisions of Chapter 18 of Title 33, U.S. Code, including all amendments that may hereafter be made thereto shall apply in respect to the injury or death of an employee or an employer carrying on any employment in the District of Columbia, irrespective of the place where the injury or death occurs * * *.

SUMMARY OF ARGUMENT

1. It is well settled that under the Longshoremen's and Harbor Workers' Compensation Act, the findings and conclusions of the Deputy Commissioner must be accepted upon judicial review if supported by evidence in the record and not prohibited by law. Cardillo v. Liberty Mutual Ins. Co., 330 U.S. 469, 477-478; O'Leary v. Brown-Pacific-Maxon, 340 U.S. 504, 508; Hurley v. Lowe, 83 U.S. App. D.C. 123, 168 F. 2d 553, 555, certiorari denied, 334 U.S. 828; Phoenix Assurance Company of New York v. Britton,

110 U.S. App. D.C. 118, 289 F. 2d 784, 786; United Painters & Decorators v. Britton, 112 U.S. App. D.C. 236, 301 F. 2d 560, 562. Furthermore, in reviewing the conclusion of the Deputy Commissioner that an injury did or did not arise out of and in the course of employment, courts are not to apply restricted common-law concepts of scope of employment and they are not to treat the question as one of law for independent judicial ascertainment. Instead, the question is to be viewed as one of fact, with the Deputy Commissioner's resolution being conclusive if supported by evidence and not precluded by law. O'Leary v. Brown-Pacific-Maxon, supra, 340 U.S. at 507-508.

2. In light of the limited scope of judicial review of the Deputy Commissioner's finding that the injury to the claimant arose out of and in the course of employment, it is clear that on the facts of this case, the district court correctly refused to set aside the compensation award. The finding that the claimant's trip to Toronto and attendance at the union convention there was in the performance of his employer's service (J.A. 5), has a firm basis in the evidence showing that the claimant was a shop steward and executive board member of the union, that the claimant was expected to attend the convention, and that the employer union selected the claimant to attend the convention as an alternate delegate, paid him a salary for attending the convention, paid the claimant's

transportation expenses to and from Canada as well as his living expenses there, and received a benefit from the claimant's attendance at the convention and his taking part in meetings and discussions there (J.A. 18-20, 26, 31, 35, 42-45). The conclusion that the injury to the claimant, resulting from his fall in a bathtub at the convention hotel, arose out of or in the course of employment, was certainly warranted in light of the fact that the claimant was on a special mission for his employer, was engaged in reasonable and expected activity, and was, moreover, preparing himself for the convention banquet which he was expected to attend and the expenses of which were paid by the union (J.A. 21-24). This conclusion is completely in accord with the principle, recognized by many decisions, that when an employee travels on his employer's business to a place different from the regular place of employment, any injury during the absence from home is compensable so long as the employee at the time of the injury was engaged in expectable or reasonable activity. See, e.g., Hurley v. Lowe, supra; Miller v. Bartlett Tree Expert Co., 3 N.Y. 2d 654, 148 N.E. 2d 296; Fleer v. Glens Falls Insurance Company, 16 A.D. 2d 186, 226 N.Y.S. 2d 918.

ARGUMENT

I. Upon Judicial Review of a Compensation Order, the Findings of the Deputy Commissioner, Including the Finding that the Claimant's Injury Arose Out of and in the Course of his Employment, Are To Be Accepted if Supported by Substantial Evidence and Not Precluded by Law.

The appellants, asserting that "whether or not an accident arises out of and in the course of employment is

a question of law for a court to determine * * *" (Appellants' Brief, p. 18), rely upon only a part of the testimony before the Deputy Commissioner and upon certain legal principles having no application to the situation where an employee is sent upon a journey or special mission, in support of their argument that the injury to the claimant was not in the course of his employment. Without any reference to the appropriate standard of judicial review under the Longshoremen's and Harbor Workers' Compensation Act, the appellants appear to seek de novo consideration by this Court of the "course of employment" question. However, the scope of judicial review of factual findings, inferences and conclusions of the Deputy Commissioner is much narrower than this. Furthermore, and contrary to the appellants' assertion, the Deputy Commissioner's resolution of the "course of employment" question falls within the category of a factual finding or inference which is to be given conclusive effect if supported by substantial evidence and not forbidden by law. Thus, even if this Court were to agree with the appellants' view of the evidence and restrictive concept of "course of employment," we submit that that in itself would furnish no basis for setting aside the compensation award. Only if the Court is ready to conclude that the Deputy Commissioner's inference that the injury occurred in the course of employment was without substantial support in the record and/or precluded by law, would there be a ground for overturning the award.

These principles have been firmly established by many decisions of the Supreme Court and of this Court.

Thus, in Cardillo v. Liberty Mutual Co., 330 U.S. 469, 477-478, where the disputed issue was whether the employee's injury arose out of or in the course of employment, the Court stated:

> In determining whether a particular injury arose out of and in the course of employment, the Deputy Commissioner must necessarily draw an inference from what he has found to be the basic facts. The propriety of that inference, of course, is vital to the validity of the order subsequently entered. But the scope of judicial review of that inference is sharply limited by the foregoing statutory provisions. If supported by evidence and not inconsistent with the law, the Deputy Commissioner's inference than an injury did or did not arise out of and in the course of employment is conclusive. No reviewing court can then set aside that inference because the opposite one is thought to be more reasonable; nor can the opposite inference be substituted by the court because of a belief that the one chosen by the Deputy Commissioner is factually questionable. * * *
>
> It matters not that the basic facts from which the Deputy Commissioner draws this inference are undisputed rather than controverted. * * * It is likewise immaterial that the facts permit the drawing of diverse inferences. The Deputy Commissioner alone is charged with the duty of initially selecting the inference which seems most reasonable and his choice, if otherwise sustainable, may not be disturbed by a reviewing court. * * * Moreover, the fact that the inference of the type here made by the Deputy Commissioner involves an application of a broad statutory term or phrase to a specific set of facts gives rise to no greater scope of judicial review. * * * Even if such an inference be considered more legal than factual in nature, the reviewing court's function is exhausted when it becomes evident that the Deputy Commissioner's choice has substantial roots in the evidence and is not forbidden by the

> law. Such is the result of the statutory provision permitting the suspension or setting aside of compensation orders only "if not in accordance with law."

Similarly involving a controversy over whether an accident arose out of or in the course of employment was O'Leary v. Brown-Pacific-Maxon, 340 U.S. 504, 507-508, where the Supreme Court reiterated:

> The Deputy Commissioner treated the question whether the particular rescue attempt described by the evidence was one of the class covered by the Act as a question of "fact." Doing so only serves to illustrate once more the variety of ascertainments covered by the blanket term "fact." Here of course it does not connote a simple, external, physical event as to which there is conflicting testimony. The conclusion concerns a combination of happenings and the inferences drawn from them. In part at least, the inferences presuppose applicable standards for assessing the simple, external facts. Yet the standards are not so severable from the experience of industry nor of such a nature as to be peculiarly appropriate for independent judicial ascertainment as "questions of law."
>
> Both sides conceded that the scope of judicial review of such findings of fact is governed by the Administrative Procedure Act. * * * It is sufficiently described by saying that the findings are to be accepted unless they are unsupported by substantial evidence on the record considered as a whole.

And later, the Court pointed out that so long as the Deputy Commissioner "could rationally infer" that the accident was "attributable to the risk of the employment," the inference must be accepted by the reviewing court, even though the contrary inference might have been permissible under the evidence and also binding upon the court, 340 U.S. at 508-509. See, in addition,

Phoenix Assurance Company of New York v. Britton, 110 U.S. App. D.C. 118, 289 F. 2d 784, 786, where, after observing that "Workmen Compensation laws are construed liberally in favor of injured employees * * *" and that "all doubts should be resolved in favor of the employee * * *," this Court emphasized that the role of the court was a "sharply limited review function * * *." See also, United Painters & Decorators v. Britton, 112 U.S. App. D.C. 236, 301 F. 2d 560, 562.[1/]

1/ In support of the argument that "whether or not an accident arises out of and in the course of employment is a question of law for a court to determine * * *" and that "the facts here raise a clear cut question of law * * *" (Appellants' brief, p. 18), the appellants cite Shreve v. Hot Shoppes, Inc., 110 U.S. App. D.C. 268, 292 F. 2d 761. However, that case furnishes utterly no support for appellants' argument. It was not an action to review a grant or denial of compensation. Instead, it was an action at law by an employee against the employer for damages resulting from a personal injury. The question of whether the injury arose out of and in the course of employment was raised in connection with the defense that the employee's exclusive remedy was under the Longshoremen's and Harbor Workers' Compensation Act. The trial judge had submitted this issue to the jury, and, in this connection, the Court ruled, 292 F. 2d at 762: "This was error because the applicability of the law is a question for the court." The Court went on to hold that the Compensation Act provided the exclusive remedy. Thus, the Shreve decision in no way supports the appellants' argument that the Deputy Commissioner's finding with regard to course of employment presents an issue of law for de novo resolution by this Court. Instead, as made clear by the above quoted passages from Cardillo v. Liberty Mutual Co., supra, and O'Leary v. Brown-Pacific-Maxon, supra, the inference that the claimant's injury arose out of and in the course of employment is conclusive upon the reviewing court if it has a rational basis.

A vivid illustration of the limited scope of review under the Longshoremen's and Harbor Workers' Compensation Act, is presented by this Court's decision in Hurley v. Lowe, 83 U.S. App. D.C. 123, 168 F. 2d 553, certiorari denied, 334 U.S. 828, a case factually very much in point here. In Hurley, an employee whose regular place of employment was the District of Columbia travelled to New York and then to Boston in order to attend conferences on behalf of his employer. At the end of the day in Boston, he had dinner at a restaurant with some relatives. While escorting his elderly father down a short flight of stairs in the direction of the men's lavatory, he slipped and fell, sustaining an injury which resulted in his death. Thus on their facts, the two cases are quite similar. In the instant case also the claimant was sent on a special trip by his employer, and while away, was injured when engaging in activity which was a normal incident of the trip. However, the Deputy Commissioner in Hurley found that the death did not arise out of and in the course of employment, and denied compensation. In Hurley, this Court strongly expressed the view that the employee's death arose out of and in the course of employment. Nevertheless, because of the very limited scope of review under the Act, the Court refused to set aside the Deputy Commissioner's denial of compensation. After quoting from Cardillo v. Liberty

Mutual Insurance Co., supra, Judge Prettyman stated for the Court, 168 F. 2d at 555:

> Thus, we understand the opinion in that case to hold that a reviewing court must look to see, not whether the principles of law applied by the Deputy Commissioner are correct, but merely whether they are forbidden by law, or without any reasonable legal basis, or are invalidated by some formal principle of law. The two approaches, and the two views of the function of the courts, are wholly different.
>
> The present case is an apt illustration of the point just discussed. As a matter of unweighted impression, we are of opinion that the Deputy Commissioner was in error upon the legal principle involved in his inference from the basic facts. The "course of employment" on a specified errand, ordered by an employer, to a place different from the regular place of employment, includes all the ordinary incidents of the errand which the employer would normally contemplate as occurring in the course of it. Thus, when the employing firm sent this lawyer, otherwise engaged in practice in the District of Columbia, on a business trip for specific purposes, all the natural incidents of that trip which would be contemplated by the employer, such as the eating of meals in ordinary places at ordinary times, were in the course of that employment. This is not only the normal concept established in the business world, but fits the intent of the law as to coverage against injury.

And then, concluded, at 556:

> But, while we think that the Deputy Commissioner was in error as to the legal content of the term "in the course of employment" in the statute, we cannot say that his view is "forbidden by the law" or without any reasonable legal basis.

~~That~~ The Hurley case would seem to be virtually dispositive here. The Deputy Commissioner's inference that the claimant's injury arose out of and in the course of his

employment, is completely in accord with what this Court in Hurley held was the correct application of workmen's compensation principles to this basic fact situation, i.e., activity which is an ordinary incident of a special mission or errand for the employer. The ruling in the present case represents nothing but an adoption of the principles enunciated by this Court in Hurley. If, because of the very limited scope of judicial review, the Deputy Commissioner's conclusion in Hurley v. Lowe could not be set aside as legally forbidden, even though it did not represent the better view of the course of employment question in this travel situation, certainly the Deputy Commissioner's conclusion in the instant case, which is entirely in accordance with the substantive principles announced in Hurley, should not be set aside.

Moreover, a more detailed review of the evidence in the present case, as well as many other judicial decisions involving basically similar factual situations, fully confirms that the Deputy Commissioner's conclusion here had "substantial roots in the evidence and is not forbidden by the law." Cardillo v. Liberty Mutual Co., supra, 330 U.S. at 478.

II. The Deputy Commissioner's Conclusion that the Injury to the Claimant Arose Out of and in the Course of his Employment, is Supported by the Evidence and by the Many Judicial Decisions Concerning Employees Injured While Away from Home on a Journey for their Employers.

The appellants challenge on two grounds the Deputy Commissioner's finding that the claimant Greenwell's injury arose out of and in the course of his employment with the union. On the one hand, it is asserted that the trip to Toronto for the purpose of attending the union convention was a voluntary pleasure trip and not a mission on behalf of the employer (appellant's brief, pp. 19-21). Alternately, it is contended that even if the trip to Toronto was a business trip or errand for the employer union, the act of the claimant in taking a bath at the hotel was outside of the course of employment (appellant's brief, pp. 10-18). However, both of these arguments are devoid of merit.

1. The Deputy Commissioner expressly found that the claimant was "performing services for the employer as an alternate delegate at a biennial convention of the employer's parent organization * * *" (J.A. 5); that the employer "authorized his attendance at the convention in the capacity of an alternate delegate" (J.A. 6); that in the event of the incapacity of a regular delegate, the claimant would

have had to take his place, and therefore he attended the business meetings and remained on call throughout the convention (J.A. 6-7); "that by attending the business meetings of the convention the claimant became a better-informed and more effective member of the executive board, which was a benefit to the employer in the furtherance of its operations as a labor union"(J.A. 7); and that the employer made the reservations for the claimant at the convention hotel and paid the cost, paid the claimant wages for the duration of the convention, paid the claimant a daily expense allowance, and paid for the cost of transportation (J.A. 7). Undoubtedly, these findings warranted the conclusion that the trip to the convention in Toronto constituted a special mission for the employer, on the employer's business. Furthermore, the findings are amply supported by the testimony before the Deputy Commissioner.

The claimant Greenwell testified that he was employed as both a shop steward and as a member of the executive board of the appellant local union, and that in the latter capacity, he had attended every convention of the parent International union since 1950 (J.A. 17-18). He stated that he was expected to attend these conventions and was "supposed to be there at all times the convention is going on" (J.A. 18). The Secretary-Treasurer of the appellant union testified that the purpose of the conventions, which were

held every two years, was "to discuss active business coming before the international association" (J.A. 37). With regard to the convention at the King Edward Hotel in Toronto, Canada, in September 1961, the appellant local had been allotted only nine delegates, although there were ten members on the local executive board who were supposed to be delegates under the local's rules and practice (J.A. 26, 37-38). Therefore, "one of the delegates had to be eliminated as a delegate" (J.A. 38). At a meeting of the executive board on August 15, 1961, several methods were discussed as to how to eliminate one of the board members, but before anything was decided, the claimant Greenwell offered to be an alternate to the convention "and Brother Greenwell's offer was accepted" (J.A. 39).

The claimant testified that the appellant employer paid him his regular salary during attendance at the convention, plus an amount each day for expenses (J.A. 19). In addition, the employer paid the claimant's railroad fare to and from Toronto (J.A. 19). The expenses at the convention banquet were paid by either the local or international union (J.A. 23). With respect to his duties at the convention, the claimant explained that, as an alternate delegate, he would have replaced any of the regular delegates who became incapacitated and, in such event, would have assumed the regular delegate's duties, including

voting (J.A. 31). [2] And the claimant testified that he attended all of the convention meetings and took part in the discussions in order that he could have replaced a regular delegate if necessary (J.A. 27, 31).

Finally, the Secretary-Treasurer of the appellant employer acknowledged that it was beneficial to the appellant union that the claimant had offered to be the one to go to the convention as an alternate, as it contributed to intra-union harmony (J.A. 41). The Secretary-Treasurer further acknowledged that as a result of attending the convention meetings and discussions, the claimant would be a better informed member of the executive board and would be more effective in the local union (J.A. 42). This witness also confirmed the claimant's testimony that the employer paid the claimant a salary and expenses for attending the convention (J.A. 42-44).

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2 / As to this one point, the claimant's testimony was contradicted by another officer of the appellant union, the Secretary-Treasurer, who testified that as there was no provision in the union's constitution for official alternate delegates, the claimant could not have acted in place of an incapacitated delegate (J.A. 39,42). However, the Deputy Commissioner chose to accept the claimant's testimony on this point (J.A. 6). Certainly, it is the province of the Deputy Commissioner to resolve such conflicts in the testimony.

Moreover, the Secretary-Treasurer of the appellant admitted during cross examination that the executive board meetings referred to the claimant as an alternate delegate (J.A. 42), that the membership of the union voted their approval of the alternate delegate arrangement (J.A. 43), that the executive board of the union was desirous to take the claimant to Toronto as a member of the official delegation (J.A. 44), and that as far as the appellant local union was concerned, the claimant was on duty (J.A. 45).

In light of the above-summarized testimony, there is no merit in the appellants' assertion that the claimant's trip to Toronto to attend the union convention was solely a "pleasure" trip for the claimant's "own enjoyment and purpose" (appellants' brief, p. 19). Undoubtedly, there was pleasure and enjoyment associated with the mission for all of the delegates. Nevertheless, the testimony fully supports the Deputy Commissioner's findings, to the effect that this was a journey for the employer, on the employer's business. The evidence revealing that the claimant's attendance of the convention was in the course of his employment is clearly substantial.

2. The appellants' alternate contention, that even if the journey to Toronto and attendance at the convention was within the course of the claimant's employment, still the injury due to slipping in the bathtub was outside of the course of employment, similarly lacks merit. The testimony relating to the injury was this: The appellant union's parent orgainzation, the International, had selected the King Edward Hotel in Toronto as the place for the convention (J.A. 19), and the appellant union had made the room reservation at this hotel for the claimant (J.A. 24). The bathtub in the claimant's hotel room was quite different than the one in his home which he had been used to, for it was much higher and had a rounded rather than a flat bottom

(J.A. 22-23, 28, 33). On September 14, 1961, in the late afternoon, and after attending that day's meetings, the claimant returned to his room in order to prepare himself for the convention banquet that evening, and, as part of such preparation, decided to take a bath (J.A. 21, 24). He wanted to "dress up" and make a good impression at the banquet "for our local", i.e., the appellant employer (J.A. 34). The claimant testified that the banquet was part of the convention and it was expected that board members would attend the banquet (J.A. 22). The expenses of the banquet were paid by either the employer union or its parent organization (J.A. 23). At the banquet, there were guest speakers and discussions among the delegates both of a social nature and of a business nature (J.A. 28, 34-35). While taking the bath in preparation for this banquet, the claimant slipped in the bathtub and injured himself.

Considering these facts surrounding the injury, and the further fact that the claimant was on a special mission for his employer, the Deputy Commissioner's inference that the injury arose out of and in the course of employment was fully warranted. See, Hurley v. Lowe, supra. The principle that where an employee is on a special mission for the employer, all reasonable and expectable activity during that mission is within the course of employment, is entirely applicable here.

Thus, in several situations virtually indistinguishable in any relevant sense from the instant case, the courts have upheld compensation awards. Precisely in point is the decision of the New York Court of Appeals in Miller v. Bartlett Tree Expert Co., 3 N.Y. 2d 654, 148 N.E. 2d 296. There, an employee of a New York tree surgeon had traveled to Connecticut to attend a three-day conference dealing with new methods and experimental work in this line of business. The conference was an annual affair, evidently much like a trade convention. During the late afternoon of one of the three days, after attending the day sessions of the conference, the employee returned to his hotel room to prepare himself for an evening session. As part of such preparation, the employee decided to bathe, and, like the claimant Greenwell, slipped in the bathtub and injured himself. The employee received a compensation award, and, in upholding that award, the Court of Appeals ruled that the injury "necessarily arose out of and in the course of his employment" 3 N.Y. 2d at 656.

The so-called special mission ruled, applied in the above case, has been particularly developed in New York. 3/

3/ Decisions under the New York law are particularly persuasive, since the Longshoremen's and Harbor Workers Compensation Act was adopted from that law. House Report No. 1190, 69th Congress, First Session. See also, Lawson v. Suwanne Fruit & Steamship Co., 336 U.S. 198, 205.

It was succintly stated by the New York court in Schneider v. United Whelan Drug Stores, 284 App. Div. 1072, 135 N.Y.S. 2d 875, 876:

> [W]hen an employee is required to travel to a distant place on the business of his employer and is directed to remain at that place for a specified length of time, his status as an employee continues during the entire trip, and any injury occurring during such period is compensable, so long as the employee at the time of the injury was engaged in a reasonable activity. (Emphasis supplied).

In that case, the employee was sent from his regular area of employment in New York to Miami, Florida, on the employer's business, and after working in Miami during the day, he went swimming for recreation, and the court held the injury to be compensable. In Fleer v. Glen Falls Insurance Company, 16 A.D. 2d 186, 226 N.Y.S. 2d 918, 920, an employee in the employer's personnel department was sent to a distant city to interview prospective new employees. During the evening in the distant city he went to a tavern for recreation, and was killed upon leaving the tavern. In affirming the compensation award, the court reiterated:

> Where an employer sends an employee away from home it has been held that the test as to whether specific activities are considered to be within the scope of employment or purely personal activities is the reasonableness of such activities. Such an employee may satisfy physical needs including relaxation.

The special mission principle has been applied in a variety of situations to uphold compensation awards. See, e.g.,

Schreiber v. Revlon Products Corp., 5 A.D. 2d 207, 171 N.Y.S. 2d 122 (employee, while walking back to her hotel for dinner, slipped and fell); Kohl v. International Harvester Co., 9 A.D. 2d 597, 189 N.Y.S. 2d 361 (employee had an automobile accident while going to a restaurant); Bower v. Industrial Commission, 61 Ohio App. 469, 22 N.E. 2d 840 (school teacher, attending a teacher's institute in a distant city at the request of the school superintendent, was injured while going to her place of lodging); Gardner v. Industrial Commission, 72 Ariz. 274, 233 P. 2d 833 (employee, while returning from a convention, was killed in an airplane accident). See also, Voehl v. Indemnity Ins. Co., 288 U.S. 162, 169-170; Clapham v. David, 232 App. Div. 458, 251 N.Y.S. 245; Thornton v. Hartford Accident & Indemnity Co., 32 S.E. 2d 816 (Ga.); Alexander File Co. v. Industrial Commission, 319 P. 2d 1074 (Colo.); Williams v. School City of Winchester, 104 Ind. App. 83, 10 N.E. 2d 814; Southern Motor Lines v. Alvis, 200 Va. 168, 104 S.E. 2d 735; 1 Larson, Workmen's Compensation Law, Sec. 24.23. Under the principle established by these decisions from many jurisdictions, where an employee is sent on a journey for his employer to a place distant from his home, any activity while away from home is within the course of employment, just so long as it is reasonable, or expectable, or an ordinary incident of the trip. In the instant case, the activity of the claimant in taking a bath at the hotel to

prepare himself for the union banquet, was certainly reasonable, expectable, and an ordinary incident of attending the convention in a distant city as a representative of his employer.

The appellants, in maintaining that the claimant's injury was outside of the course of employment, rely for the most part upon two classes of cases, neither of which is in point. First, reliance is placed upon several cases which did not involve a mission for the employer or travel at all on behalf of the employer, but, instead, concerned injuries disconnected with the employment.[4] Second, the appellants place a great deal of weight upon cases involving injuries to traveling salesmen.[5] However, these cases also do not involve a trip or mission for the employer to a place distant from the normal area of employment, for, in a

4 / See, e.g., Pillsbury v. Liberty Mutual Ins. Co., 143 F. 2d 807 (C.A. 9) (employee had not yet begun his journey for the employer when the accident occurred); Davis v. Newsweek Magazine, 305 N.Y. 20, 110 N.E. 2d 406 (employee was not on an errand for his employer but was on his vacation); Hall v. City of New York, 258 App. Div. 830, 15 N.Y.S. 2d 672 (employee was taking a bath at her residence, which was also her normal place of employment); Shultz v. Nation Associates, Inc., et al., 281 App. Div. 915, 119 N.Y.S. 2d 673 (employee was an office worker who, at her normal place of employment was injured while combing her hair preparing to go to lunch, by sticking the comb in her eye); Hayes v. Alabama Bi-Products Corp., 5 So. 2d 624 (Ala.).

5 / Davidson v. Pansy Waist Co., 240 N.Y. 584, 148 N.E. 715; Johnson v. Smith, 263 N.Y. 10; Wynn v. Southern Surety Company, 26 S.W. 2d 691 (Tex. Civ. App.); Gibbs Steel Company v. Industrial Commission, 243 Wisc. 375 10 N.W. 2d 130. But see, Leif v. A. Walzer & Son, 248 App. Div. 651, affirmed, 272 N.Y. 542, 4 N.E. 2d 727, apparently overruling Davidson v. Pansy Waist Co., supra, and Johnson v. Smith, supra.

real sense, the entire area covered by a traveling salesman is his normal area of employment. His activities on the road, such as eating, sleeping, bathing, etc., may be viewed as part of his personal life, just as if he were employed in a specific place rather than employed to travel over a large area. The distinction was pointed to by this Court in Hurley v. Lowe, supra, 168 F. 2d at 555:

> We do not think that this problem can be solved by a general recourse to cases which involve "eating" or which concern "traveling salesmen", many of which cases are cited to us. The traveling salesman may, literally, live on the road, and his meals and sleeping quarters may properly be considered a part of his personal and private life, just as they would be if he were employed at a fixed place. His situation does not seem to us to be similar to that of one who is sent by his employer from his fixed place of employment upon a specific errand elsewhere.

At any rate, whether or not traveling salesmen should be encompassed within the special mission rule is not involved here. What is involved is an employee who was sent by his employer upon a particular journey to represent the employer. He was injured on that mission while engaging in activity that was reasonable, expectable, and an ordinary incident of the journey. Under principles sanctionsby this Court in Hurley v. Lowe, and by many other courts, such injury is regarded as arising out of and in the course of employment. At the very least, it could not be said that the

Deputy Commissioner was prohibited by law from inferring that the injury arose out of and in the course of the claimant's employment.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be affirmed.

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